AFFIRMED; Opinion Filed January 5, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01407-CR

WILLIE FRANK WILSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F08-39144-I

MEMORANDUM OPINION

Before Justices Lang, Myers, and Evans
Opinion by Justice Myers

A jury convicted appellant Willie Frank Wilson of capital murder and the trial court imposed a mandatory sentence of life imprisonment without the possibility of parole. In nine issues, appellant argues (1) the trial court erred by overruling his *Batson* challenge; (2) the evidence is insufficient to support the conviction; (3) the trial court erred by overruling objections to the State's summary of testimony from an expert, (4) to autopsy photographs, (5) to testimony of a "911 operator," and (6) to the court's decision to replace a juror with an alternate; (7) the court erred by denying appellant the right to cross-examination and confrontation; (8) the court erred by denying the defense's request that the jury be instructed on the lesser-included offense of murder; and (9) the court erred by overruling appellant's objection to testimony from a cell tower expert. We affirm.

BACKGROUND

At around 6:30 a.m. on the morning of February 29, 2008, a 911 operator received a cell phone call from a man who reported that he had just returned home from work and found his girlfriend and her daughter dead. The caller, appellant Willie Frank Wilson, reported that his girlfriend, Nitalya Tilley, and her daughter, Twaleshia Jones, were dead in the middle of the floor and that there was blood everywhere. The 911 operator told appellant to step outside of the house and that someone was on the way. The operator asked appellant if there were any weapons laying around; appellant said he did not see any. Appellant also said he had been calling Tilley during the night but she was not answering her phone. Appellant said he had just gotten off of work and was talking to his sister on the phone when he unlocked and opened the front door and saw Tilley's and Jones's bodies on the floor. Appellant said he had last spoken to Tilley at around 9:15 p.m. on the night before when he left for work.

When officers from the Lancaster, Texas police department arrived at appellant's house at 4188 Edwards Street in Lancaster, he was standing outside on the front lawn. Officers saw two cars parked in the driveway: Tilley's gold Oldsmobile and appellant's Chrysler Sebring. The front passenger door to the Oldsmobile was open. The back door of the house appeared to have been forced open.

Several officers entered the house to secure it. After the house was cleared and secured, Officer Zach Howard spoke with appellant. Appellant repeated the information he told the 911 operator, e.g., that he tried to contact Tilley several times by phone throughout the night but was unable to reach her. Appellant added that after he opened the front door, went in, and saw Tilley and Jones dead in the living room, he backed out of the house and called 911. Appellant did not report having any contact with either of the bodies, and denied going into the Oldsmobile. Appellant told Officer Howard that he and Tilley had been living together for six months and

that they had been dating for approximately a year. Officer Howard recalled that appellant appeared to be "very calm and collected" when he spoke to the officers and that the tone of their conversation was "just very normal," which struck Officer Howard as "quite odd."

When Lancaster Officer Machelle McAnally arrived at the crime scene at around 7:00 a.m., appellant was sitting in the back of a patrol car. He was not in custody or under arrest at that time, according to the officer's testimony, nor was he even a suspect at that point. Appellant told McAnally that his girlfriend and her daughter were inside the house, and that he, Tilley, and Jones had lived in the house for six months. Appellant also pointed out that the lease with his and Tilley's name on it was in the kitchen.

McAnally recalled that appellant's statement regarding the lease was an odd response to a question about who lived in the house. Appellant told McAnally he left for work at 9:15 p.m., clocked in at 9:48 p.m., and departed work at 6:01 a.m. Appellant added that he "did leave for Taco Bell" after leaving work. He reached into his pants pocket and tried to hand McAnally a Taco Bell receipt, but McAnally was not sure what the receipt meant at the time and told appellant to hold on to it. Appellant did not tell McAnally he left work "for anything else other than Taco Bell."

McAnally later drove the distance from appellant's place of work in Mesquite to the Taco Bell appellant claimed he visited—the drive took six minutes. When McAnally asked appellant if Tilley or Jones were having any problems, he named Daniel Howard, an ex-boyfriend of Tilley's who lived in Tyler, Texas. Appellant said that Howard had pulled a gun on him during an altercation in a church parking lot. Appellant handed McAnally a Dallas Police Department business card with the name of a detective involved in that investigation. McAnally later eliminated Daniel Howard as a suspect after interviewing Howard and his sister, and using phone records to confirm that Howard spoke to Tilley on the night of the murder using a land-line

telephone located in Tyler. Appellant also said Jones had a boyfriend named Josh, but appellant was not aware of any problems between them. Appellant gave written consent for the police to search his home, vehicle, and person.

Lancaster Police Lieutenant Michael Smith testified that when he first arrived at the crime scene, he met with the patrol supervisor and detectives, made sure the crime scene had been secured, and ordered that the neighborhood be canvassed. Lieutenant Smith and Officer McAnally searched the area behind appellant's house after learning that the back door had been forced open and the neighbors had reported hearing dogs barking "at a certain period of time." Smith and McAnally found a knife in a culvert approximately 100 yards from the house. The knife appeared to have blood on it. Aliece Watts, a forensic scientist and quality director at Integrated Forensic Laboratories (IFL), photographed and collected the knife. While searching the area, Smith also found a recently discarded white, "plastic-like" grocery bag filled with cleaning supplies and a towel in a grassy area approximately 500 feet from the house. During a search of Tilley's car, he found a completed apartment application in the glove compartment and snacks and bags filled with clothes in the trunk.[1] Smith thought the bags of clothes in the trunk made it look as though "they were going to be traveling somewhere."

Detective Jason O'Briant accompanied appellant to the police station and conducted a background interview, interviewing appellant for approximately fifteen minutes. Appellant was not a suspect at this time, nor was he under arrest. During the interview, appellant handed O'Briant a receipt from Taco Bell dated "29/02/08" and time-stamped "12:57AM." Appellant consented to being photographed and to giving police the clothes and shoes he was wearing. O'Briant requested that a crime scene investigator come to the police department to photograph

[1] Janet Rodriguez, a leasing agent for the Colonia Tepeyac Apartments, identified the apartment application that was found in Tilley's car as a copy of an application she submitted on January 29, 2008 for an apartment that was subsidized by the U.S. Department of Housing and Urban Development (HUD). Rodriquez testified that Tilley listed only herself and Jones as the intended tenants on the application.

appellant and collect his clothes. Aliece Watts, the IFL forensic scientist, took a buccal swab sample of appellant's DNA and assisted officers at the crime scene.

Detectives Garrick Whaley and Brad Spannagel, deputies with the Dallas County Sheriff's Department physical evidence section, collected the evidence and processed and photographed the crime scene. They photographed, among other things, a shoeprint visible in the dirt by the back door and splintered fragments of the back door. There were signs of a forced entry on the back door where the frame and deadbolt had been damaged. The deadbolt from the back door was found just inside the house on top of the dryer. Whaley noted that the location of the deadbolt was unusual for a forced entry break-in because, "generally speaking, the deadbolt is many feet away from the door. It's not sitting right beside the door." Whaley also testified that items that would typically have been taken in a burglary—including musical instruments, stereo equipment, a TV, a computer, a cell phone, jewelry, and a guitar case propped behind a door—were untouched.

Tilley's and Jones's bodies were found on the living room floor near the front door. Pieces of wood from a broken TV tray were strewn around their bodies and throughout the living room. There were extensive blood stains on both sides of the loveseat, and underneath the loveseat cushions one could see a pool of blood and pieces of a tray table. Detective Whaley noted that you could see the blood splatter on the wall behind the loveseat. A faint shoeprint in blood was visible in the entryway.

Tilley and Jones each had multiple stab wounds, blunt force injuries, and defensive wounds. Tilley's body had five stab wounds to the chest and abdomen, and three blunt-force injuries to the back of the head, according to the medical examiner's testimony. There were fourteen stab wounds on Jones's body and five blunt-force injuries to her head. The medical examiner noted that a piece of wood was capable of causing serious bodily injury or death and

could have caused some of the blunt-force injuries on Jones's body. Tilley's leg was draped partly over Jones's body, and a shoe print in blood was visible on Jones's abdomen. Whaley went to the medical examiner's office and "lifted" the shoeprint from Jones's abdomen. Impressions taken from the shoes appellant was wearing on the night of the murder were subsequently compared to the shoe print lifted from Jones's abdomen and the two were determined to be, according to the testimony of Ronald Thomas Fazio, a laboratory director and forensic scientist for IFL, "positively associated."

Tilley's and Jones's pants were partially pulled down and their shirts were pulled up, but subsequent autopsies and DNA analysis showed no signs of sexual assault. Whaley noted that the way Jones's pants were pulled down would have made it difficult for any kind of a sexual act to occur. He also noted that the temperature inside the house was abnormally warm and that the thermostat was set on "heat and auto" and "turned all the way up." Asked what the significance of this was, Whaley testified that the only reason he could think of for turning up the heat was if the person who committed the murders was attempting to speed up the decomposition process by increasing the heat in the home. Whaley concluded, based on the evidence he saw, including the placement of the victims' bodies and the positioning of their clothes, that the scene "appeared somewhat staged."

After assisting Whaley in processing the crime scene, Detective Spannagel went to the police station where he photographed appellant's arms, chest, back, and hands, collected and photographed appellant's clothes and shoes, and conducted appellant's gunshot residue test. Spannagel testified that appellant removed each article of clothing and it was placed in a separate paper bag. Detective Spannagel then placed the evidence he collected in the trunk of his car and drove back to the crime scene where the evidence was placed in the crime scene van.

The evidence Detectives Whaley and Spannagel collected was transported to their office.

Appellant's clothes were taken to a processing room, removed from their individual bags, and hung up to dry in a room that was specifically designed for that purpose. After the clothes dried, Whaley photographed and documented each item individually and then placed the clothes in a single bag for release to the Lancaster Police Department. The items included a jacket, a pair of pants, an undershirt, underwear, socks, and a cap. Whaley packaged each of appellant's shoes in separate bags. He also photographed and documented the other evidence collected at the scene. Whaley identified possible stains on the inside pocket of appellant's pants, the front and back of appellant's T-shirt, and on appellant's shoes.

Aliece Watts, the IFL forensic scientist, conducted presumptive and confirmatory tests for the presence of blood or bodily fluids on the stains found on appellant's clothes and shoes. She said a presumptive test for blood found that the knit cap, socks, jacket and underwear did not have any blood stains, but stains on the T-shirt, pants' pocket, and shoes all had presumptive and confirmatory tests indicative of human blood. Watts testified that the blood stains on the T-shirt were "spatter stains" and that "spatter is when blood that is flying through the air impacts an object." Watts explained that one of the primary ways blood is found on both the front and the back of a garment, as in this case, "is when someone is wielding a weapon and they are striking the victim multiple times." She testified that, based on her experience, the stains on the clothes did not look like "transfer stains," which would occur from coming into contact with another object covered in blood. They "looked like stains that were of the blood flying through the air." She also testified that the blood stain on the top of appellant's shoe was "indicative of the type of stain that you would see if the blood had been flying through the air and landed on the top of the shoe."

Christina Capt, a supervisor and DNA analyst at the University of North Texas Health and Science Center for Human Identification, performed the DNA analysis. She testified that the

DNA tests on a stain sample taken from the front of appellant's T-shirt showed a mixed DNA profile consisting of a major female contributor and at least one minor contributor. Tilley could not be excluded as the major contributor of the DNA, and the chance of someone other than Tilley matching the major contributor's DNA profile was 1 in approximately 3.7 quintillion African Americans. DNA tests of a stain sample taken from the back of appellant's T-shirt included only a single-source female profile. Jones could not be excluded as the contributor of the DNA from the back of the T-shirt, and the chance of someone other than Jones matching the contributor's DNA profile was 1 in approximately 15.4 quintillion African Americans. DNA tests conducted on blood samples taken from the blade and handle of the knife found in the culvert showed that Tilley and Jones could not be excluded as contributors to the mixed DNA from the knife blade. The chance of the contributors being persons other than Tilley and Jones was 1 in 10 billion.

Ray Clark, the custodian of records for the cell phone carrier Sprint, testified that he was responsible for maintaining Sprint documents, retrieving and producing documents in response to search warrants, orders, and subpoenas, as well as identifying and explaining those documents at trials and hearings. He noted that he had previously testified regarding cell phone records and cell phone information "[m]any times." He identified State's exhibits 133–140 as Sprint records. He identified the records for cell phone number 903–269–0190, assigned to appellant Willie Frank Wilson at 4188 Edwards Street in Lancaster. Clark's testimony also identified the records for cell phone number 214–929–2174, assigned to Nitalya Tilley, also known as Nitalya Mumphrey Tilley,[2] at 4188 Edwards Street.

Clark explained to the jury how cell phones attach to cell towers within a

[2] Tilley is identified on copies of her social security card and driver's license submitted with the HUD housing application as Nitalya Mumphrey Tilley.

communications network before a call is made. He testified that cell phones are always looking for and choosing a tower with the strongest signal. Clark noted that "all things equal, that's generally the closest cell tower to where you're at." Clark testified that if a person is traveling while talking on the phone, the records would show the first cell tower to which the phone connected and the last tower it used. Clark testified that across the network, cell towers have ranges from on average of two miles in "very urban environments" to ten miles in "very rural environments." Provided the phone actually rings, it will ping off a specific cell tower location. But if you turn your phone off completely and it is unavailable and goes straight to voice mail, there would not be location available. During his testimony, Clark identified the cell towers to which appellant's and Tilley's respective phones attached on the evening of February 28, 2008, and the morning of February 29, 2008.

The calls and their respective cell tower attachments were visually represented in a PowerPoint presentation that was admitted as State's exhibit 142. According to that PowerPoint and Clark's testimony, at 9:29, 9:31, and 9:41 p.m. on February 28, 2008, appellant's cell phone signal attached to three cell towers consistent with appellant traveling from his house in Lancaster to U.S. Corrugated, Inc., appellant's workplace. Outgoing calls from appellant's cell phone made at 11:11, 11:12, 11:18 and 11:23 p.m. all attached to two cell towers consistent with those calls having been made from appellant's place of work. At 11:30 and 11:31 p.m., appellant received an incoming and made an outgoing call that attached to the same cell tower—moving away from, but still in the range of, appellant's place of work. At 11:48 p.m., appellant made an outgoing call that was consistent with having used a cell tower on Highway 20, near appellant's home. Clark testified that the 11:48 p.m. call's attachment to the particular cell tower was not consistent with the call having been made from appellant's workplace, but was consistent with the call being made from the offense location. He also said that outgoing calls made at midnight

on February 29, 2008, and at 12:02 a.m., from appellant's phone were consistent with someone who was at or near the offense location. He said that calls made at 12:08, 12:09, and 12:10 a.m. were not consistent with appellant having been at his workplace and that the probable location of the phone would be at or near the location of offense. Incoming calls made to appellant's phone at 12:34 and 12:36 a.m. likewise attached to cell towers consistent with appellant's phone being at or near the offense location. At 12:47 a.m., appellant made an outgoing call that attached to two cell towers consistent with heading away from the offense location and moving toward appellant's workplace. At 1:02 a.m., appellant received an incoming call that attached to a cell tower consistent with appellant's phone being at or near a Taco Bell—one located near appellant's place of work. And at 1:28 a.m., appellant made an outgoing call that attached to a cell tower consistent with appellant's phone being at or near his workplace. Phone records showing the signal from appellant's phone attaching to certain cell towers beginning at 6:05 a.m. and continuing through 6:38 a.m. were consistent with appellant having traveled from his place of work back to the crime scene.

Barbara Counsel, a registered nurse, program director, and instructor at PCI Health Training Center, testified that she knew Tilley and that she was a former student who was studying to become a nurse's assistant and patient care technician. Counsel referred Tilley to student services after learning she was in an abusive relationship. Asked if she knew the name of the boyfriend involved, Counsel replied, "Willie." Counsel also identified the "Getting to Know You" form filled out by Tilley—in which she wrote, in response to the statement, "Name one thing that could prevent you from completing your education," "My boyfriend."

Appellant did not testify in his defense. As part of his defense, he called George Masters who testified that he met appellant "back in 1978." They were part of a gospel music group that played at churches; the two of them also sometimes traveled together. In 2007, appellant's band

was playing at the Phileo Baptist Church. Masters was outside the church watching appellant's van while he unloaded equipment for a concert. Appellant's girlfriend, Tilley, was in the parking lot when a man drove up and got out of his car. He saw the man grab and twist her by the arms and then pull out a knife and force her into the car. They stayed in the car for ten to twelve minutes and then got out of the car and went into the church. Masters later learned the man's name was Daniel Howard. Masters also described a second event that occurred on a Sunday afternoon at the Church of Philadelphia on Sunnyvale Street. Masters testified that Howard came into the church during a service and that, a few minutes later, he saw Tilley, Jones, and appellant walking out of the church followed by Howard, who had his hand in his pocket. The police arrived and Howard was arrested after a gun was found under a car. Howard was yelling profanities and hitting his head on the window of the police car. Masters recalled, "[E]verybody said, man, this man is crazy," to which Masters replied that he did not know what was wrong with him. On cross examination, Masters testified that he saw Howard hold the knife at Tilley's neck when he forced her into the car, but he did not call the police because he did not have a phone. He thought someone else must have called them.

Ricky Coleman testified that he had known appellant for 20 to 25 years, and that he knew both appellant and Masters through different singing events and engagements at church. Coleman testified that, sometime in 2007, he was attending an anniversary event at the Ladelle Church when Howard entered the church and made a "commotion" while talking to Tilley, who was sitting a couple of seats in front of Coleman. Howard took Tilley outside, then reentered through the back of the church and made Tilley sit in the choir stand. He said appellant went to calm Howard down but he got even louder, telling everybody to leave him alone. He said several men, including appellant, told Howard to calm down but he continued to yell. Coleman said Howard eventually left the building through the back door. Coleman testified that Howard,

who had a knife "kind of like tucked up under his . . . sleeve," warned the men not to "mess with" him and that no one was going to "tell me crap."

The jury found appellant guilty of capital murder as charged in the indictment. The trial court imposed a mandatory sentence of life imprisonment without the possibility of parole. *See* TEX. PENAL CODE ANN. § 12.31(a)(2). This appeal followed.

DISCUSSION

1. VOIR DIRE

In his first issue, appellant contends the trial court erred by overruling his *Batson* challenge to the State's use of peremptory strikes on three African-American venire members, prospective jurors 41 (Caster Chatman), 46 (Sandra Ann Carter), and 53 (Cynthia Lou Walker). *See Batson v Kentucky*, 476 U.S. 79 (1986).

The record shows that, at the conclusion of voir dire, the trial court identified the list of venire members who had been struck. The trial court identified twelve jurors and one alternate that would be seated in this case. The State indicated it had no objection to the seated jurors and the following exchange ensued:

> [DEFENSE]: Objecting to first the State struck No. 41, the second is 46, the third is 53, and effectively removed all the black jurors as a strike. The State struck, Number 41, Caster Chatman, a black individual; 46 is Sandra Ann Carter, a black individual; Linda—no that's not one; Cynthia Lou Walker is Number 53, a black individual; and that effectively removed any potential black members of the jury panel that were left that were not excused for cause.
>
> THE COURT: Well, does the State have any—any reasons why they struck either 41, 46, or 53?
>
> [STATE]: Starting with Number—well, actually, Your Honor—41, 46, and 53, all of them had either personal criminal history or their family members had criminal histories, and, specifically, if we go to Number 41, we took notes that he was sleeping during part of the State's voir dire.
>
> As far as Number 46, she has a criminal history, as well her husband has an extensive criminal history; and Number 53, she has a criminal history herself, which we tried to be very consistent, and we can show others who are not of the

African-American descent that also was struck for that same reason.

As an example, Number—Number 22. He had an extensive criminal history, as well.

THE COURT: All right.

Defense counsel asked if any of the criminal histories would have disqualified the jurors. The State answered "no" and clarified that some of the criminal history information concerned the jurors' spouses:

[DEFENSE]: Judge, I have a question. When you say, "criminal history" for the people you struck from the black race, what history are you talking about? Is it the type of history that would keep them off as juror or what?

[STATE]: No. Some would, like—well, some of them involving their husbands, and we will present also, Your Honor—for the record, we will present to [defense counsel] the JI55 history that we ran on each of the jurors.

And, specifically, none of these cases would have been enough to strike them from the panel, like, a theft check, that may have gotten discharged or something of that nature, but with the history of their spouses, it's just that it's extensive, but we will present to [defense counsel], see where there's attached the JI55, which shows the histories that the State refer to and referenced.

The discussion continued as follows:

[STATE:] . . . Well, let's look at Number 40—we'll go first with the Number 41; 41, black male, he has—he and his wife had criminal histories. First, Mr. Chatman, Mr. Chatman, himself, had an assault in '99 that was dismissed, and then his wife had—oh, theft check 20, and a theft check 1,500, that was later dismissed; and then we have Number 46, which is a African-American female, and her husband has—her husband's name is Jerry Carter, and he has a prostitution charge, which he was found guilty of. He has a violation of several—two protective orders. He has possession of marijuana, that was dismissed, and assault dismissed, two assault family violence dismissed, and then he has a possession of marijuana, which he pled guilty for.

And then the last one will be Number 53. Number 53 is a black male—excuse me—black female, Cynthia Walker, and she has a theft check, which was dismissed, and then she had another theft check, which was dismissed, as well.

[DEFENSE]: Is that it?

[STATE]: Those are those three, which you simply requested.

[DEFENSE]: Can you tell us if there are any other people of different races of the

same and similar situations which you struck?

[STATE]: Yes. Number 22 is an example. Number 22 had—he is a white male, and his name is Michael Warner, and he had a theft check 20, which was dismissed, and then just as recent as 2015, he had a Class C—which I don't even know what this stands for—but it's a DISTC. It's some kind of device, destruction of some kind of device or a display of some device.

And then we have Number 54, Hispanic male, and his name is Antonio Ramirez, Jr. He had a DWI in 2012, which was dismissed, and he has an obstruction of passageway, which he received deferred on.

The trial court ultimately overruled the defense's objection to the State's use of its peremptory strikes.

When we review a trial court's ruling on a *Batson* challenge, we should not overturn the trial court's resolution of the *Batson* issue unless we determine that the trial court's ruling was clearly erroneous. *Blackman v. State*, 414 S.W.3d 757, 765 (Tex. Crim. App. 2013) (citing *Herron v. State*, 86 S.W.3d 621, 630 (Tex. Crim. App. 2002)); *see Davis v. State*, 329 S.W.3d 798, 815 (Tex. Crim. App. 2010). We review the entire record of voir dire, *see Blackman*, 414 S.W.3d at 765, and do so in the light most favorable to the trial court's ruling. *Davis*, 329 S.W.3d at 815. In a *Batson* hearing, "[t]he trial court is the sole judge of the credibility of the witnesses and may choose to believe or disbelieve all or any part of any witness' testimony." *Wiltz v. State*, 749 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1988, no pet.). The Supreme Court has recognized that credibility determinations of the trial court should be given great deference on appellate review. *See Batson*, 476 U.S. at 98 n.21.

Analysis of a *Batson* claim consists of three steps. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). The first step of a *Batson* challenge begins when a challenger makes "a prima facie showing of racial discrimination in the state's exercise of its peremptory strikes." *Davis*, 329 S.W.3d at 815 (citing *Herron*, 86 S.W.3d at 630). In the second step, the burden shifts to the party making the strikes to articulate race-neutral explanations for its strikes. *Id*. Once the party

making the strikes has articulated race-neutral explanations, in the third step, the burden shifts back to the challenging party to show that the explanations are a pretext for discrimination. *Id*. The trial court must then determine whether the challenging party has carried its burden of proving discrimination. *Id*.

Here, appellant challenged the State's striking of prospective jurors 41, 46, and 53. Because the trial court immediately moved to step two by inquiring whether the proponent had a non-discriminatory purpose, we assume the opponent satisfied the step-one obligation to make a prima facie case of purposeful discrimination. *See Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008). The State then gave race-neutral reasons for its strikes, arguing that each of the venire members were struck because either they or their spouses had criminal histories. *See Garcia v. State*, 833 S.W.2d 564, 567 (Tex. App.—Dallas 1992), *aff'd*, 868 S.W.2d 337 (Tex. Crim. App. 1993) (striking juror because relatives had been arrested, charged, or convicted of a crime has been held race-neutral).

Disparate treatment is a factor we consider in determining whether the State's facially race-neutral explanation is a pretext for discrimination. *See Johnson v. State*, 959 S.W.2d 284, 292 (Tex. App.—Dallas 1997, pet. ref'd). In this case, defense counsel responded to the State's articulation of race-neutral reasons for striking the prospective jurors by asking if there were people of other races struck for similar reasons. The State identified venire member 22, a white male struck because he had a dismissed theft check case and a class C citation for "DISTC," and venire member 54, a Hispanic male struck because he had a DWI dismissed in 2012 and an "obstruction of passageway" that resulted in deferred adjudication. The trial court overruled appellant's objection without explanation.

We cannot automatically impute disparate treatment in every case in which a reason for striking a minority venire person also technically applies to a non-minority venire person whom

the prosecutor found acceptable. *Leadon v. State*, 332 S.W.3d 600, 612 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *see Cantu v. State*, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992). It "is unlikely that two venire persons on one panel will possess the same objectionable attribute or character trait in precisely the same degree." *Cantu*, 842 S.W.2d at 689. Such differences may properly cause the State to challenge one potential juror and not another. *Id.*; *Leadon*, 332 S.W.3d at 612.

By overruling appellant's objection, the trial court implicitly found the State's explanation credible and that the State's reasons for striking the venire members were race-neutral. Appellant offered no evidence or argument to show the State's articulated reasons were pretextual. The trial court's role is to assess the plausibility or persuasiveness of the given explanations. *Purkett*, 514 U.S. at 768. As we noted earlier, we give great deference to the trial court's credibility determinations. *Batson*, 476 U.S. at 98 n.21. We conclude the trial court did not err by denying appellant's *Batson* challenges concerning potential jurors 41, 46, and 53, and we overrule appellant's first issue.

2. SUFFICIENCY

In his second issue, appellant argues the evidence is insufficient to prove he participated in the offense of capital murder.

In reviewing the sufficiency of the evidence, we consider all the evidence in the light most favorable to the jury's verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The trier of fact is the sole judge of the weight and credibility given to witness testimony. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). We may not act as the "thirteenth juror" and reweigh the jury's determinations of the weight or credibility of the evidence. *Williams v. State*,

235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The standard is the same for both direct and circumstantial evidence. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). The State need not disprove all reasonable hypotheses that are inconsistent with the defendant's guilt. *Id*. Rather, a court considers only whether the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict. *Id*.; *see also Hooper v. State*, 214 S.W.3d 9, 12 (Tex. Crim. App. 2007).

The indictment alleged that appellant committed capital murder by intentionally and knowingly killing Nitalya Tilley and Twaleshia Jones during the same criminal transaction and during a different criminal transaction but pursuant to the same scheme or course of conduct. A person commits murder if he intentionally or knowingly causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1). A person commits capital murder if he commits murder as defined by section 19.02(b)(1) and murders more than one person during the same criminal transaction or during different criminal transactions but pursuant to the same scheme or course of conduct. *Id*. § 19.03(a)(7)(A), (B).

In order to prove capital murder under section 19.03(a)(7), the State must establish a discrete, specific intent to kill as to each death. *See Ex parte Norris*, 390 S.W.3d 338, 340 (Tex. Crim. App. 2012); *Chung Kim v. State*, No. 05–14–00138–CR, 2015 WL 1935948, at *4 (Tex. App.—Dallas April 29, 2015, no pet.) (mem. op., not designated for publication). The jury may infer the intent to kill from the defendant's acts, words, or conduct, *Hall v. State*, 418 S.W.2d 810, 812 (Tex. Crim. App. 1967) (quoting *Kincaid v. State*, 150 Tex. Crim. 45, 198 S.W.2d 899, 900 (Tex. Crim. App. 1946)), *see also Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (intent may be inferred from circumstantial evidence such as acts, words, and conduct of accused), and from any facts in evidence it believes prove the existence of that intent, such as the use of a deadly weapon. *Brown v. State*, 122 S.W.3d 794, 800 (Tex. Crim. App. 2003). If a

deadly weapon is used in a deadly manner, the inference is almost conclusive that the defendant intended to kill. *Adanandus v. State*, 866 S.W.2d 210, 215 (Tex. Crim. App. 1993); *Godsey v. State*, 719 S.W.2d 578, 580–81 (Tex. Crim. App. 1986); *Womble v. State*, 618 S.W.2d 59, 64 (Tex. Crim. App. [Panel Op.] 1981).

The evidence in this case indicates that Tilley was planning on moving into an apartment. She did not list appellant's name on the apartment application signed on January 29, 2008, only a month before her death, suggesting she may have been planning on moving into that apartment without him. She told her instructor she was in an abusive relationship with her boyfriend and that his name was "Willie." Tilley had been romantically involved with Daniel Howard before she dated appellant and continued to see and talk to him while she and appellant were living together. Tilley and Jones were murdered in appellant's house on a night when the trunk of Tilley's car was packed with bags of clothes, as though she was preparing to travel somewhere. Both Tilley and Jones suffered multiple deep stab wounds, blunt force injuries, and defensive wounds. Their bodies were moved and their clothes positioned to make it look as though they had been sexually assaulted, but there was no evidence of sexual assault. The crime scene appeared to have been staged. In addition, the thermostat was set on "heat and auto" and "turned all the way up." According to Detective Whaley's testimony, this may have been done in an attempt to speed up the decomposition of the bodies. Appellant's shoeprint matched a shoeprint in blood lifted from Jones's abdomen. The victims' blood was found on the front and back of appellant's T-shirt, and the blood spatter pattern on appellant's T-shirt was consistent with a person repeatedly stabbing the victim. It was not consistent with a transfer stain. Appellant had a jacket on over his T-shirt when police arrived. The knife found in the culvert had blood on it from both victims, and the knife's use as a weapon was consistent with cuts found on the loveseat and several of the victims' injuries. Blood found on the top of appellant's shoe was

consistent with blood spatter—blood flying through the air. Cell phone records established that appellant was near the offense location at the time of the offense, despite his statements that he was at work and had not seen Tilley since he left for work the night before.

Based on the evidence presented, the jury could have reasonably concluded that appellant killed Tilley and Jones because he was angry over Tilley's apparent decision to leave him and/or her continued contact with Howard. The jury could have rationally determined that the blood spatter on appellant's clothing resulted from him repeatedly stabbing Tilley and Jones with the knife. The jury could have likewise believed appellant staged the crime scene to make it look as though a burglar and/or rapist had committed the crime, and that he stopped at the Taco Bell restaurant and obtained the receipt for the specific purpose of creating an alibi. Although appellant points to various facts and circumstances that allegedly cast doubt on the sufficiency of the evidence—e.g., the Taco Bell receipt, the land-line telephone call from Howard's residence to Tilley's cell phone, the absence of wounds on appellant or the outward appearance of blood on his clothing, the apparent signs of forced entry on the back door where the frame and deadbolt had been damaged, the possibility that blood could have been deposited on appellant's clothing when he discovered the bodies—these arguments concern the jury's assessment of the weight and credibility of the evidence, matters that fall within the jury's province. Under the *Jackson* standard, this Court must defer to the jury's credibility and weight determinations, and we will not disturb those findings here. *See Jackson*, 443 U.S. at 319. Accordingly, we conclude that the evidence is sufficient to support the verdict. We overrule appellant's issue.

3. Summaries of Cell Phone records and Cell Tower Information

In his third issue, appellant argues the trial court erred by overruling appellant's objections to a summary and a PowerPoint presentation compiled from Sprint cell phone records and cell tower information, State's exhibits 141 and 142.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *See Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). So long as the trial court's decision is within the zone of reasonable disagreement and correct under any theory of law applicable to the case, it will be upheld. *Id*.

The admission of documents that summarize other documents is controlled by rule 1006 of the Texas Rules of Evidence, which imposes three requirements for the admissibility of summaries of records "that cannot be conveniently examined in court," and they are as follows: the underlying records are (1) voluminous; (2) have been made available to the opponent for inspection; and (3) the underlying records are admissible. *See* TEX. R. EVID. 1006; *C.M. Asfahl Agency v. Tensor, Inc*., 135 S.W.3d 768, 800 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

State's exhibits 133 through 140, which include the Sprint cell phone records underlying the two exhibits at issue here, and also exhibits 136A (appellant's cell phone records) and 137A (Tilley's cell phone records), were admitted without objection from appellant. Exhibit 141, the summary, is three and a-half pages in length and shows cell phone tower and related information for Tilley's and appellant's cell phone numbers for February 28 to 29, 2008. The information reflected in the summary includes outgoing and incoming calls made from and to appellant's and Tilley's cell phones, the start and end time of each call, the cell tower to which the phone's signal attached at the start of the call, the cell tower to which the signal attached at the end of the call, and the cell towers' physical address and longitude and latitude coordinates. Exhibit 142, the PowerPoint presentation, consists of 60 slides showing the location of appellant's and Tilley's cell phone signals and specific cell phone towers to which they attached during February 28 and 29, 2008.

During his testimony, Clark explained that a State's investigator he worked with, Moe Brown, compiled the summary and created the PowerPoint presentation. Clark testified that he

did a line by line comparison of the underlying records with the summary and PowerPoint to make sure the information presented in those summaries correlated correctly with the actual documents included in State's exhibits 133–140. Clark stated that the information in the State's summary and PowerPoint equated exactly with the information included in the original exhibits and that the compiled information would be helpful to the jury in understanding his testimony and the Sprint records. Clark also noted that the summary essentially put all of the information in one location, and that the summary was easier to use than attempting to sort through all of the underlying records. Clark testified that the summary in exhibit 141 was a collection of calls for Tilley's cell phone number and appellant's cell phone that showed "the communication that had cell site information for those two particular phone numbers, including the date and time of those calls, as well as the beginning and ending cell site information, and then, additionally, the address and latitude/longitude of that particular cell site all on one page." Clark testified that exhibit 142 was a PowerPoint presentation of this information that was also created by Brown—information that Clark verified, according to his testimony.

When the State offered exhibits 141 and 142 into evidence, appellant asked to take Clark on voir dire. Clark testified that an "11" before the area code of a phone number in the cell phone records indicated the call was answered by voicemail. Asked if the summary included all the numbers listed or whether some were redacted, Clark explained that it listed the phone number initiating the call and the phone number receiving the call, but omitted the dialed digits between the two of them. Clark further testified that "only the actions from our [Sprint] records that had cell site information" were included in the summary, and that a person from the District Attorney's office used the Sprint records to create the summary. Appellant's trial counsel asked whether it was true that the summary was not an accurate reflection of the information that was given to the District Attorney's Office, to which Clark responded, "It represents what I said,

showing phone transactions and their cell site locations for those specific numbers for that time frame."

Appellant's objection to admission of exhibits 141 and 142 was that the proper predicate had not been laid and that they misrepresented the totality of the evidence. The State responded that rule 1006 authorized the use of a summary to simplify vast amounts of information by placing them in a more readable form. The State further argued that if appellant had questions regarding whether a call went to voicemail rather than going to the "real phone," that information was reflected in the underlying records. The court overruled appellant's objection and admitted exhibits 141 and 142.

The Sprint records on which exhibits 141 and 142 are based take up approximately 133 pages in the exhibit volume of the reporter's record. Those pages include copies of appellant's cell phone records, Tilley's cell phone records, the "repoll" records from various cell towers,[3] and an explanatory key.[4] The underlying Sprint records, State's exhibits 133–140 and exhibits 136A and 137A, were made available to appellant prior to trial and were admitted into evidence without objection. The trial court could have reasonably concluded that omission from the summary in exhibit 141 of additional information reflected in the underlying cell phone records did not make the compiled information inaccurate—it was merely a summary. The court could have also concluded that the PowerPoint presentation in exhibit 142 was an accurate depiction of the relevant information, including the cell phone towers to which appellant's and Tilley's cell phone signals attached during the relevant time frame. We conclude no abuse of discretion has been shown. We overrule appellant's third issue.

[3] Clark testified that "repoll" referred to a switch, "a computer that controls cellular communication for a specific geographic area," and that the assigned repoll number helped "identify if the phone call is a voice call versus a text message by the numbers that are assigned."

[4] State's exhibit 135 is Sprint's "Key to Understanding Viador Reports," i.e., the provided cell phone records, which identifies various information reflected in the cell phone records.

4. AUTOPSY PHOTOGRAPHS

In his fourth issue, appellant contends the trial court erred by overruling his objection to the admission of 23 autopsy photographs, State's exhibits 2, 4, 156, and 182–201, because they were "highly prejudicial." He contends that the number of exhibits offered was "excessive" in that many of the photographs were of the same wound, taken at various distances, and that the photograph of Tilley's excised heart was "especially gruesome."

According to the record, Kathleen McCowin, Tilley's mother and Jones's grandmother, identified State's exhibit 2 as a photograph of Jones and State's exhibit 4 as a photograph of Tilley. Dr. Read Quinton, Deputy Chief Medical Examiner for the Dallas County Medical Examiner's Office at the Southwestern Institute of Forensic Sciences, identified State's exhibit 4 as the identification photograph he took at the time of Tilley's autopsy. He confirmed that the photograph accurately depicted how Tilley's face and body appeared on February 29, 2008. Dr. Quinton also testified that State's exhibit 152 was a copy of the medical examiner's report generated in connection with Tilley's autopsy. When the State offered exhibit 4 into evidence, appellant objected that it had already been admitted "for record purposes, so there's no probative value," and that "the prejudicial effect outweighs the probative value." The trial court overruled the objection.

Dr. Quinton also identified photographs he took at the time of Tilley's autopsy (State's exhibits 153–177), the diagram he drew to demonstrate Tilley's "sharp-force injuries" (State's exhibit 178), and the diagram he drew to demonstrate the "blunt-force injuries" to Tilley's head (State's exhibit 179). When the State offered exhibits 153 through 177 into evidence, appellant objected to exhibit 156—it depicts the stab wound to Tilley's heart after it was removed from her body—on the grounds it showed "extreme dissection," and that the probative value of the photograph was "outweighed by tremendously prejudicial effect." The trial court overruled the

objection.

Former Dallas County Deputy Chief Medical Examiner Dr. Joni McClain performed Jones's autopsy.[5] Dr. McClain identified Jones's autopsy identification photograph (State's exhibit 2), blood card (State's exhibit 230), sexual assault kit (State's exhibit 150), autopsy report (State's exhibit 180), and autopsy diagram (State's exhibit 181). When the State offered exhibits 2, 150, 180, 181, and 230 into evidence, appellant stated he had no objection to 150, 180, 181, and 230, but he objected to the admission of exhibit 2 on the ground "it is the commencement of dissection of an autopsy, and we believe the prejudicial value far outweighs the probative value." The trial court overruled the objections.

Dr. McClain identified State's exhibits 182 through 201 as photographs that were taken at the time of Jones's autopsy. She noted that the exhibits included the "as-is" photographs and photographs of the injuries visible on the outer portion of the body. Dr. McClain testified that the photographs accurately represented how Jones looked when McClain received her body and performed the autopsy. When the State offered exhibits 182–201 into evidence, appellant objected "that these are autopsy pictures, and that the probative value is—the prejudicial value far outweighs and probative value." The trial court overruled appellant's objection.

We review the trial court's ruling admitting the autopsy photos under an abuse of discretion standard. *Winegarner*, 235 S.W.3d at 790; *Wyatt v. State*, 23 S.W.3d 18, 29 (Tex. Crim. App. 2000). Generally, autopsy photographs are admissible unless they depict mutilation of the victim caused by the autopsy process. *See Santellan v. State*, 939 S.W.2d 155, 172 (Tex. Crim. App. 1997); *Burdine v. State*, 719 S.W.2d 309, 316 (Tex. Crim. App. 1986). A court does not abuse its discretion by admitting autopsy photographs that help illustrate and clarify a medical examiner's testimony. *See Harris v. State*, 661 S.W.2d 106, 107–08 (Tex. Crim. App.

[5] She testified that she retired from the Dallas County Medical Examiner's Office in June of 2014.

1983). A medical examiner is entitled to use autopsy photographs to explain his findings related to the manner of death, the cause of death, the time of death, and the number of wounds sustained by a victim. *Long v. State*, 823 S.W.2d 259, 274 (Tex. Crim. App. 1991). Autopsy photographs that aid a jury in understanding a victim's injuries are relevant and thus probative. *See Drew v. State*, 76 S.W.3d 436, 452 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). If a jury could not fully see the extent of a victim's injuries by photographs of external wounds, autopsy photographs depicting internal injuries are particularly relevant, even if the photographs show skin excised by the autopsy process. *See Hayes v. State*, 85 S.W.3d 809, 816 (Tex. Crim. App. 2002).

Under rule 403, all relevant evidence is admissible unless "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. EVID. 403. Rule 403 favors admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). A court may consider the following factors in determining whether the probative value of photographs is substantially outweighed by the danger of unfair prejudice: (1) the number of exhibits offered, (2) their gruesomeness, (3) their detail, (4) their size, (5) whether they are offered in color or in black and white, (6) whether they are close-up, and (7) whether the body depicted is clothed or naked. *Sosa v. State*, 230 S.W.3d 192, 195 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

In this case, appellant's objection to the autopsy photographs was that the prejudicial value far outweighed their probative value. But with the possible exception of State's exhibit 156, the photograph of Tilley's excised heart, none of the complained-of photographs depict any mutilation caused by the autopsy itself. *See Santellan*, 939 S.W.2d at 172; *Burdine*, 719 S.W.2d

at 316. Exhibits 2 and 4, for example, are close-up autopsy photographs showing the faces and upper chests of the two victims with their eyes open; stab wounds to the upper chest are visible. Exhibits 182 and 183 are overhead views of Jones showing a frontal view of her nude body, including bloody bandages, hands that are bagged, and pants down to the knees. Exhibit 184 is a view of the upper body and face showing several stab wounds. Exhibit 185 is a close-up view of stab wounds to the upper chest and arm. Exhibit 186 is another close-up view showing stab wounds to the upper chest and arm. Exhibit 187 is yet another close-up view of the same stab wounds to the upper chest and arm. Exhibit 188 is an overhead view of the back and buttocks showing stab wounds to the back and a shaved head showing lacerations. Exhibit 189 is a close-up view of the upper back showing those stab wounds and the lacerations to the head. Exhibit 190 is a much closer view of the shaved head showing the lacerations. Exhibit 191 is a close-up view of a wound to the inside thigh. Exhibit 192 shows wounds to the lower arm, wrist, and hand. Exhibit 193 is a close-up view of wounds to the hand. Exhibit 194 shows a stab wound to the arm. Exhibit 195 is a view of wounds to the fingers and thumb with a finger retracted to show depth of the bloody wound. Exhibit 196 is another photograph showing the wound to the fingers and hand. Exhibit 197 is a photograph of wounds to the arm. Exhibit 198 is a close-up view of the wounds to the arm. Exhibit 199 shows Jones's face and eyes open and a wound to her shoulder. Exhibit 200 shows the bloody shoe print on Jones's abdomen, and exhibit 201 is another photograph of the shoe print.

The autopsy photographs in State's exhibits 2, 4, and 182–201 simply reflect the condition of the victims at the time their bodies were received by the medical examiner; there is no depiction of mutilation caused by the autopsy itself. *See Santellan*, 939 S.W.2d at 172; *Burdine*, 719 S.W.2d at 316. The photos are not excessively gruesome; they only show the damage perpetrated by the murderer. Indeed, considering the number of stab wounds and blunt

force injuries inflicted on the two victims, the trial court could have concluded that admission of the autopsy photographs was both reasonable and necessary to accurately convey the violence employed in inflicting the victims' injuries. *See, e.g., Shuffield*, 189 S.W.3d at 787.

Appellant argues that the photograph of the excised heart, State's exhibit 156, is "gruesome." When, however, "the photographs at issue are depictions of internal organs which have been removed, so as to portray the extent of the injury to the organ itself, there is no depiction of 'mutilation of the victim' . . . There is no danger that the jury would attribute the removal of the organs to the defendant." *Salazar v. State*, 38 S.W.3d 141, 151–52 (Tex. Crim. App. 2001). Here, the photograph of the excised heart merely reflected the injury sustained by the victim. *See Rayford v. State*, 125 S.W.3d 521, 530 (Tex. Crim. App. 2003); *Rojas v. State*, 986 S.W.2d 241, 249 (Tex. Crim. App. 1998).

Additionally, appellant advanced a theory that Howard or some burglar and/or rapist was the murderer. The trial court could have concluded that the autopsy photographs were probative of the personal rage harbored by the murderer towards the victims and that a random burglar and/or rapist would not have had the motivation to violently inflict such wounds. Appellant also advanced a theory that he would not have had the time to drive home, murder the victims, and return to work. The trial court, however, could have concluded that the photographs were probative of the fact that the murders were carried out quickly in a rage-fueled act of violence, thereby eliminating time constraints raised by appellant's alibi. Consequently, the probative value of the complained-of photographs was not substantially outweighed by the danger of unfair prejudice, and we overrule appellant's fourth issue.

5. 911 OPERATOR

In his fifth issue, appellant argues the trial court erred by overruling his "speculation" objection to a State's question to Detective O'Briant regarding a person's motive for making a

911 telephone call.

The record shows that, during Detective O'Briant's testimony, the State asked him if he had an opportunity to listen to the 911 call. O'Briant said he had listened to it. The call was played for the jury, after which the following occurred:

> Q. [STATE:] Now, Detective, you stated that you have had some experience with being a 911 dispatcher, correct?
>
> A. [O'BRIANT:] Yes, ma'am.
>
> Q. And you did that in Red Oak and in Lancaster?
>
> A. Yes, ma'am, four years total.
>
> Q. Okay. Now, based on your training and your experience, if someone is setting up an alibi, will they often make a—make a call or set up a call that is compelling?
>
> [DEFENSE]: Objection, Your Honor. That's pure speculation on the part of this witness. He has no expertise in this. The 911 operator has nothing to do with this.
>
> [STATE]: And, Your Honor—
>
> [DEFENSE]: Speculation.
>
> [STATE]: We will respond that it's not speculation, your Honor. It's based on his training and experience. Not only has he been a 911 dispatch operator, he has also been a detective, and he's very familiar with cases involving 911 calls.
>
> THE COURT: All right. I overrule the objection. Let's move on.
>
> Q. [STATE:] You may answer.
>
> A. [O'BRIANT:] Can you repeat the question?
>
> Q. Yes. I said based on your training and experience as a dispatcher and as a detective, if someone is setting up an alibi, will they often make a call or set up a call that is compelling?
>
> A. Yes, ma'am.
>
> Q. Okay. And in this case, what did you believe?
>
> [DEFENSE]: Objection, Your Honor. It calls for speculation. There's no basis for it.

THE COURT: Overruled.

[DEFENSE]: Wouldn't his belief invade the province of the jury.

THE COURT: Overruled.

[DEFENSE]: It's up to them to look at the evidence.

THE COURT: Overruled.

[STATE]: And, Your Honor, we'll move on. We'll move on.

The trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *See Winegarner*, 235 S.W.3d at 790. Rule of evidence 602 provides that "[a]witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." TEX. R. EVID. 602. Evidence to prove the witness's personal knowledge may consist of the witness's own testimony. TEX. R. EVID. 602. Rule 701 provides that a witness who is not testifying as an expert may testify in the form of an opinion that is "(a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." TEX. R. EVID. 701. Expert testimony is governed by rule 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand evidence or to determine a fact in issue.

TEX. R. EVID. 702.

In support of his argument that the trial court erred by allowing Detective O'Briant's "speculative" testimony, appellant offers the following:

> The 911 operator did not have any knowledge of the person calling or other relevant circumstances to base his very prejudicial opinion on motive. The question was asked to get around the expert opinion rules of admissibility and as such prejudiced Appellant's right to a fair trial before the jury.

But appellant's complaint appears to be based on a misunderstanding of the witness's qualifications as well as his knowledge and participation in the investigation. For example,

although appellant's issue refers to a "911 operator," the record shows that Detective O'Briant worked for the Lancaster Police Department as a patrol officer and training field training officer from 1999 to 2005, and as a detective from 2005 to 2014. He worked as a 911 dispatcher prior to becoming a police officer. Detective O'Briant was not the lead detective on this case but testified that he was one of several detectives who assisted in the investigation. The trial court could have reasonably concluded that the detective possessed the personal knowledge and experience to answer a general question about whether a person seeking to establish an alibi would make or "set up" a call. Additionally, the State "moved on" without O'Briant answering the State's question that sought his opinion as to what happened. For these reasons, the trial court did not abuse its discretion by overruling appellant's objection, and we overrule appellant's fifth issue.

6. REPLACEMENT OF JUROR WITH ALTERNATE

In his sixth issue, appellant contends the trial court erred by determining that a sitting juror had become disabled and replacing that juror with an alternate.

The voir dire in this case was conducted on April 20, 2015. The following day, April 21, 2015, twelve jurors and one alternate were seated and sworn. Appellant was arraigned and entered his plea, the State presented opening statement, and witnesses testified. On April 22nd, the State continued in its case and chief. Before the jurors were released for the evening, the bailiff instructed them to be back the following morning by 9:00 a.m. On the morning of April 23, 2015, the trial court held a hearing outside the presence of the jury. At the conclusion of that hearing, the trial court asked the bailiff, "Okay. Deputy Kirby, you want to try to call that juror again?" There was a brief off-the-record discussion, after which the following occurred:

> THE COURT: Let's go on the record here. It's now 10:28 a.m., and the juror, Juror Number 13, John Zanjani is not here in court. He's not come to court. He was told to be here in court at 9:00.

> The last couple of days, he had called the court and said he was running late. Today, he has not called in, according to the clerk's office as of now, and the Sheriff has tried to call him three or four times and not been able to get ahold of him.
>
> We do have an alternate juror, so we'll go ahead and seat the alternate juror and proceed on.
>
> Does the State have any objection to that?
>
> [STATE]: The State does not have any objection to seating the alternate juror.
>
> THE COURT: Defense?
>
> [DEFENSE]: Yes, Your Honor. We have an objection that we're entitled to the 12 jurors that were selected. And that the determination of whether you can do that rests with Article 36.29 of [t]he Code of Criminal Procedure.
>
> You have to make a fact finding and an inquiry as to whether the juror is disabled or dead. The fact that he's not shown up does not qualify as a sufficient inquiry as to whether he's disabled.
>
> I think that—in the cases I've read, that there must be an inquiry made to him as to the disability or further investigation may be needed.

The trial court determined that the juror was "disabled from sitting because he's not here." Defense counsel argued that the court's inquiry into the juror's disability was inadequate and that it violated the Texas Constitution to go forward without the twelve originally selected jurors. The State noted that court staff had been unable to reach the juror via his provided phone numbers, and there was no way "in any short period of time" to determine why he was not answering, whether he was dead, injured, or had just decided to absent himself from the proceedings. Appellant responded that because no one had gone out to his house or place of employment, the efforts made to locate the juror were inadequate. The court replied:

> Well, I believe he must be disabled in the sense that he's not here, and we'll proceed on with the alternate juror. That's why we have the alternate juror. Let's go ahead and bring them in and proceed here.
>
> I guess we need to get our witness back on the stand. And it's now 10:34, so we've waited an hour and 34 minutes.

The jury was brought back into the courtroom and trial proceeded with the alternate juror.

The following morning, the trial court asked the bailiff if he could provide an update on the missing juror. The relevant portion of the record reads as follows:

> THE BAILIFF: Yeah. Juror Number 4, Mr. John—his name is Johnny. He said, after he left court, he was riding his bike, and hit his head real hard. He broke his bike, so he put it back together, went home. He said he couldn't sleep. He wasn't supposed to go to sleep for 24 hours. So he stayed up until 7:00. And he went and took a shower and was getting ready to come to court and said, I'm going to lay down for a few minutes. And when he woke up, it was a little after 4:00, 4:30.
>
> THE COURT: So he was asleep.
>
> THE BAILIFF: He was.
>
> [STATE]: Literally.
>
> THE COURT: Okay. Thank you. Now, are we ready to proceed?
>
> [STATE]: Yes, Your Honor.

The trial court has the discretion to determine whether a juror has become disabled and to seat an alternate juror. *See* TEX. CODE CRIM. PROC. ANN. art. 36.29; *Scales v. State*, 380 S.W.3d 780, 783 (Tex. Crim. App. 2012). The code of criminal procedure provides that alternate jurors shall replace jurors who, before the jury renders a verdict regarding a defendant's guilt or innocence, "become or are found to be unable or disqualified to perform their duties." TEX. CODE CRIM. PROC. ANN. art. 33.011(b). We review the trial court's decision to replace a juror for an abuse of discretion. *Scales*, 380 S.W.3d at 784. However, the trial court's decision must be sufficiently supported by the record, and we may not presume the court made a proper decision. *Id*. at 783. In our examination, we view the evidence in the light most favorable to the court's ruling and will only reverse if the ruling of the trial court was arbitrary or unreasonable. *Id*. The Texas Court of Criminal Appeals

> has interpreted Article 36.29 to require that a disabled juror suffer from a physical illness, mental condition, or emotional state that would hinder or inhibit the juror from performing his or her duties as a juror, or that the juror was suffering from a condition that inhibited him from fully and fairly performing the functions of a juror.

Scales, 380 S.W.3d at 783 (internal quotations omitted).

The record in this case shows that the juror in question, juror number 13, did not show up for court and that court staff tried repeatedly to reach the juror via telephone, but were unable to do so. The day after the court replaced the juror with the alternate, the absent juror notified the court he had been involved in an accident, was instructed to stay awake for twenty-four hours after the accident, and was therefore asleep when he should have been in court. The trial court's decision to dismiss the juror was based on his absence. The decision was made during trial and prior to deliberations, and the court had no way of speaking with the juror to personally assess his ability to perform his duties, other than that he was missing and unreachable. As the court stated in *Scales*:

> This Court has never required that a trial judge speak with a juror before determining that the juror is disabled. Best practices indicate that such a conversation on the record assists appellate courts in reviewing the sufficiency of the evidence supporting the dismissal, but the failure to do so—even when the juror is available to testify—is not a *per se* abuse of discretion.

Id. at 784 n.18. Regarding appellant's argument that he was deprived of his constitutional right to jury unanimity, the jury unanimously found appellant guilty as charged in the indictment, so appellant cannot show he was deprived of his constitutional right to jury unanimity. Furthermore, appellant does not direct us to any evidence in the record to show the alternate juror was unqualified. *See Ford v. State*, 73 S.W.3d 923, 925 (Tex. Crim. App. 2002) ("[W]e presume that jurors are qualified absent some indication in the record to the contrary"). An alternate juror who replaces a juror has the same functions, powers, and privileges as the other jurors. *See* TEX. CODE CRIM. PROC. ANN. art. 33.011(b). Accordingly, we conclude the trial court did not abuse it discretion by finding the absent juror disabled and replacing him with the alternate. We overrule appellant's sixth issue.

7. DETECTIVE O'BRIANT'S TESTIMONY

In his seventh issue, appellant argues the trial court erred by denying his "right to cross-examination and confrontation when the trial court sustained the State's objection to inquiring on cross-examination of one of the investigating detective's techniques."

During the defense's cross-examination of Detective O'Briant, counsel asked him if there was an interrogation technique known as "good cop/bad cop." O'Briant said the technique does exist, but he found it "to be kind of counterproductive." Counsel asked if it was permissible for an officer to "verbally lie" to a suspect or witness, and O'Briant answered, "It's permissible for an officer to verbally lie to them." When counsel asked, "And you did it on this occasion?," the State objected. After the jury was excused, the State argued appellant was attempting to go into his own self-serving hearsay statements and into O'Briant's hearsay statements made during a police interview, and that appellant's line of questioning was not relevant because the interview was not in evidence. Appellant argued the answer was not hearsay and that he had the right to question O'Briant about an interview technique and whether he used it on this defendant. Appellant asserted that he could not be kept from "asking questions about what an individual did and what part they had to play." The court sustained the State's objection and appellant asked to make a bill of exception.

The hearing was continued to the following day, at which point Detective O'Briant was called to the stand out of the jury's presence so the defense could make a bill of exception. It was as follows:

> Q. [DEFENSE:] Officer, one of the things that you do through your investigation is you try and question suspects and witnesses, correct?
>
> A. [O'BRIANT:] Yes, sir.
>
> Q. And you have various pieces of evidence that are coming in during your investigation, correct?

A. Yes, sir.

Q. And during the investigation, you don't know what has relevance and what doesn't, correct?

A. Correct.

Q. And whether someone's in a scene and has access to picking up particles of DNA or smearing blood or getting blood on them is something that would be important for you to know as an investigator in a case like this?

A. Yes, sir.

Q. *And in this case, did you ask Mr. Wilson at all whether he had touched or come in contact with either [Jones] or with [Tilley]?*

A. I don't recall specifically asking him that.

Q. Okay [emphasis added].

The State replied that it would not have a problem with any of the questions counsel had just asked, with the exception of the last one. The State argued that question went to the contents of the interview and would constitute hearsay, was not relevant, and was more prejudicial than probative. Appellant argued the court's ruling violated his federal and state constitutional rights to confront and cross-examine witnesses.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See Winegarner*, 235 S.W.3d at 790. The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 406 (1965). The right to confront one's accusers necessarily includes the right to cross-examine a State's witness. *See Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996). A defendant does not, however, have a right to "'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim. App. 2010) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). "'[I]n so far as the Confrontation Clause is concerned, trial judges retain wide latitude . . . to

impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Johnson v. State*, 433 S.W.3d 546, 555 (Tex. Crim. App. 2014) (quoting *Van Arsdall*, 475 U.S. at 679). A court exceeds this latitude "only when the trial court exercises its discretion to so dramatically curtail the defendant's cross-examination as to leave him 'unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial.'" *Id.* (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

Appellant argues that by sustaining the State's hearsay objection, the trial court denied him his Sixth Amendment right of confrontation. According to the record, appellant was interviewed by detectives at the police station twice. Those interviews—one a fifteen minute interview conducted by Detective O'Briant, the other a more than two-hour interview by Detective Heath Crossland and Officer Wes Blair—were not admitted into evidence. Appellant articulated his objection to the trial court's ruling as a denial of the right to cross-examine O'Briant regarding his investigative techniques, but the trial court could have concluded that the question sought to elicit a hearsay response. Further, because O'Briant stated during the bill of exception testimony that he had no recollection of asking appellant whether he had touched or come into contact with either of the victims, his answer provided no relevant information about the offense. Accordingly, the trial court did not abuse its discretion by sustaining the State's objection. We overrule appellant's seventh issue.

8. LESSER-INCLUDED OFFENSE

In his eighth issue, appellant contends the trial court improperly denied his request for an instruction on the lesser-included offense of murder.

A trial court has a statutory duty to deliver to the jury a written charge distinctly setting

out the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14; *Delgado v. State*, 235 S.W.3d 244, 247, 249 (Tex. Crim. App. 2007). A defendant who requests an instruction on a lesser-included offense is entitled to have the requested instruction included in the court's charge where (1) "'the proof for the offense charged includes the proof necessary to establish the lesser-included offense[,] and [2] there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense.'" *See Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007) (quoting *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993).

The theory of capital murder under which appellant was indicted and convicted alleged that he intentionally and knowingly murdered more than one person during the same transaction or during a different transaction but pursuant to the same scheme or course of conduct. *See* TEX. PENAL CODE ANN. § 19.03(a)(7). This capital murder provision incorporates the offense of murder in its definition. *Id*. § 19.03(a). Therefore, murder is a lesser-included-offense of the charged offense of capital murder. *See id.* §§ 19.02(b)(1); 19.03(a)(7). However, appellant would be entitled to a lesser-included-offense instruction on murder only if the evidence would allow a rational jury to find he intentionally or knowingly caused the death of only one individual during the same criminal transaction or pursuant to the same scheme or course of conduct.

As our review of the evidence in this case shows, there is no evidence from which a rational jury could find that Tilley and Jones were not both murdered, or that they were not murdered during the same transaction or pursuant to the same scheme or course of conduct. Accordingly, there is no evidence from which a rational jury could find that if appellant is guilty he is guilty only of the lesser-included-offense of murder. *See, e.g., Feldman v. State*, 71 S.W.3d

738, 752–53 (Tex. Crim. App. 2002) (defendant was not entitled to lesser-included-offense instruction on murder because "a rational jury could only conclude that appellant's behavior in killing both truck drivers was committed pursuant to the same overarching objective or motive and, hence, was committed pursuant to the same scheme or course of conduct," even though evidence showed defendant murdered truck drivers approximately 45 minutes apart), *superseded by statute on other grounds*, *as recognized in Coleman v. State*, No. AP–75478, 2009 WL 4696064, at *11 (Tex. Crim. App. Dec. 9, 2009) (not designated for publication). Hence, the trial court properly denied appellant's request for a lesser-included instruction on murder, and we overrule appellant's eighth issue.

9. RAY CLARK'S TESTIMONY

In his ninth issue, appellant argues the trial court improperly overruled appellant's "speculation" objection to testimony from Sprint employee Ray Clark regarding the geographic implications of a cell phone's attachment to a particular cell tower.

During his testimony, Clark noted that he had previously testified regarding cell phone records and cell phone information "[m]any times." He then explained how cell phones attach to cell towers within a communication network before a call is made. He testified that cell phones are constantly looking for and pre-choosing a tower with the strongest signal, and if "you move again even before another call, it's going to continue to make that evaluation to determine what is the strongest signal at any given time." Clark added that "all things equal, that's generally the closest cell tower to where you're at." He testified that if a person was traveling while talking on the phone, phone records would show the first tower to which the phone connected and the last tower used. Clark testified that across the network, cell towers have ranges from, on average, two miles in "very urban environments" to ten miles in "very rural environments." Provided the phone actually rings, it will "ping" off of a specific tower location. But if you turn your phone

off completely and it is unavailable and the call goes straight to voicemail, "there would not be location available."

As we discussed earlier, Clark identified the phone records for appellant's cell phone number and the phone records for Tilley's cell phone number. Clark used the State's summary and PowerPoint presentation, both compiled from the cell phone records that were admitted without objection, to identify the cell towers to which appellant's and Tilley's phones' signals attached on the evening of February 28, 2008, and the morning of February 29, 2008. Clark testified, for example, that an outgoing call made by appellant at 11:48 p.m. on February 28 was pinging off of a particular cell tower that was not consistent with the call having been made from appellant's workplace. Clark explained the factors he looked at to reach this conclusion:

> Number 1, I looked at distance. Even just direct distance and not even driving distance, to determine to be outside the range of what we'd expect for a phone call in even a suburban environment, as well as the fact that there was a number of other cell sites between the two that were already in evidence between the two different time frames and showing that there are other cell sites that exist that potentially could have been used by someone who was at U.S. Corrugated.

Asked if he looked at "elevated items between the two locations," Clark responded:

> I did. Though looking at a map is hard to determine, you know, exactly the degree of elevation there is between the two.
>
> But if there was anything that would block the line of site, then it would also play a huge factor in keeping that signal from going that distance, though the distance itself is already a huge factor.

The record then reads as follows:

> Q. [STATE:] Okay. At this point, would this cell tower pinging be consistent with Willie Wilson being back at the offense location, 4188 Edwards Street?
>
> [DEFENSE]: Objection, Your Honor. That's going to call for speculation even based upon his testimony. He's already stated he can't give a precise location of the person. He can just give a two mile range. So that's going to be speculation.
>
> THE COURT: Overruled.
>
> Q. [STATE:] Would it be consistent with that?

A. [CLARK:] A phone call at the offense location would be consistent with hitting that tower.

We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *Sexton v. State*, 93 S.W.3d 96, 99 (Tex. Crim. App. 2002). The admissibility of expert testimony is governed by Texas Rule of Evidence 702, which was designed to relax the traditional barriers to opinion testimony. TEX. R. EVID. 702; *Morris v. State*, 361 S.W.3d 649, 654 (Tex. Crim. App. 2011). It is a trial court's responsibility under rule 702 to determine whether proffered scientific evidence is sufficiently reliable and relevant to assist the jury. *Jackson v. State*, 17 S.W.3d 664, 670 (Tex. Crim. App. 2000). Thus, before admitting expert testimony, the trial court must be satisfied three conditions are met: (1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is appropriate for expert testimony; and (3) admitting the expert testimony will actually assist the fact finder in deciding the case. *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006); *Jackson*, 17 S.W.3d at 670. These conditions are commonly referred to as (1) qualification, (2) reliability, and (3) relevance. *Vela*, 209 S.W.3d at 131.

The focus of the reliability analysis is to determine whether the evidence has its basis in sound scientific methodology such that testimony about "junk science" is weeded out. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Reliability centers on principles and methodology rather than the conclusions an expert generates by using those principles or methodology. *See Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579, 572 (1993); *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992). Although an inquiry as to reliability is flexible, the proponent of the evidence must establish some foundation for the reliability of an expert's opinion. *Vela*, 209 S.W.3d at 134. The demonstration of reliability must be made by clear and convincing evidence. *Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005).

Appellant's argument is that the trial court erred by overruling his objection to Clark giving speculative opinion evidence. He does not elaborate on this argument, but to the extent appellant is challenging the reliability of Clark's opinion that "[a] phone call at the offense location would be consistent with hitting that tower," we conclude the reliability of Clark's expert opinion has been shown. Courts have accepted the validity of determining a cell phone's approximate historical location by identifying the cell tower with which it communicated at the relevant time. *See, e.g.*, *Robinson v. State*, 368 S.W.3d 588, 601–02 (Tex. App.—Austin 2012, pet. ref'd); *Wilson v. State*, 195 S.W.3d 193, 200–02 (Tex. App.—San Antonio 2006, no pet); *Patterson v. State*, No. 05–13–00450–CR, 2015 WL 2400809, at *9–10 (Tex. App.—Dallas May 19, 2015, pet. ref'd) (not designated for publication). Clark adequately demonstrated a sufficient level of knowledge and expertise regarding cell phone use and their related attachment to cell towers. The objected-to question asked only whether a cell phone pinging off of a particular tower would be *consistent with* a call being made from the offense location. Clark's opinion was well within his knowledge and field of expertise, given his testimony. As such, the trial court did not abuse its discretion by overruling appellant's objection. We overrule appellant's ninth issue.

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WILLIE FRANK WILSON, Appellant	On Appeal from the Criminal District Court No. 2, Dallas County, Texas
No. 05-15-01407-CR V.	Trial Court Cause No. F08-39144-I.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Myers. Justices Lang and Evans participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 5th day of January, 2017.