Affirmed and Memorandum Opinion filed January 11, 2011.

In The

Fourteenth Court of Appeals

NO. 14-08-00970-CR

TIMOTHY WAYNE SHEPHERD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1108994

MEMORANDUM OPINION

Appellant, Timothy Wayne Shepherd, appeals his conviction for murder. Tex. Penal Code Ann. § 19.02 (West 2003). Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

While 16 years old, the complainant, Tynesha Stewart, met and began dating appellant, then 24 years old. The relationship grew more serious and Stewart eventually rented an apartment in which they both lived. In 2006, Stewart was accepted into Texas A & M University and she started her freshman year that August.

During Stewart's first semester at Texas A & M, appellant called Stewart's dorm or cellular telephone several times daily. Many of Stewart's telephone conversations with appellant were unpleasant. When Stewart returned home following the end of her first semester, witnesses reported that she appeared more social and started talking to a student at another college named Mark. For a brief time, appellant's telephone calls ceased. However, by February 2007, appellant began calling Stewart again. As Stewart's spring break approached, she expressed concern about going home to Houston. Stewart stated she feared appellant would follow her around.

Despite her concern over appellant's behavior, Stewart returned to Houston for her spring break. Once back in Houston, Stewart made plans with friends to attend a concert at the Houston Livestock Show and Rodeo on Thursday, March 15, 2007. In addition, Stewart made plans to travel to Padre Island for the last part of her spring break.

On March 14, Stewart visited with Mark and other friends and then went to the apartment of her friend Lois Greenwood. Appellant picked Stewart up from that apartment early on the morning of March 15. Stewart left without her cellular telephone and told Greenwood she would return later that day. Stewart never returned to Greenwood's apartment. Stewart did not show up for the concert. When Stewart did not return to Greenwood's apartment, Greenwood eventually contacted Stewart's family. It was later determined that Stewart's younger sister was the last to speak with Stewart at about noon on March 15; at that time, she learned Stewart was with appellant.

James Hebert was appellant's neighbor. Hebert testified during appellant's trial that he saw Stewart for the last time on March 15, when she was walking up the stairs to appellant's apartment. Herbert told the jury that he and appellant frequently barbecued together and he had loaned appellant his barbecue grill. Hebert also testified that within a day or so after he last saw Stewart, appellant began barbecuing on his patio. According to Hebert, appellant was barbecuing day and night, which was unusual for appellant. When Hebert inquired if appellant would give him some of the barbecue, appellant refused,

saying the barbecue was for a wedding. Herbert testified this was unusual as appellant normally shared his barbecue. Hebert also testified that eventually the fire in appellant's barbecue grill, which was on appellant's second floor apartment patio, got out of control and Hebert's girlfriend called the fire department. Herbert further testified that he watched as the police and firefighters arrived and that appellant did not look as though he wanted them inside his apartment, but he eventually allowed them in.

Robert Logan, a Ponderosa Fire Department volunteer firefighter, and Deputy Russell of the Harris County Sheriff's Department, both testified at trial about responding to the fire on appellant's patio. Logan testified that appellant was initially reluctant to let them in the apartment. He also testified that once he got inside the apartment, he did not find a fire. Both Logan and Russell testified regarding meat they observed in appellant's apartment. They found meat in appellant's bathtub. According to Logan, there were some rib bones and two other small pieces of meat about the size of his hand floating in clear water in the tub. Russell testified he saw a rack of ribs and two small chickens floating in the tub. In addition to the meat floating in the tub, Russell testified he saw three small burned chickens sitting on the stove in appellant's kitchen. According to Russell, one of the chickens was still smoking. Russell testified he did not see anything in the apartment that he considered unusual as he had "seen people do that before in the areas that [he has] worked."

The following Monday, March 19, Harris County Sheriff's Deputy Wallace Wyatt, Stewart's mother, Gayle Shields, and Greenwood went to appellant's apartment. After appellant answered the door, Deputy Wyatt questioned appellant regarding Stewart's whereabouts. Appellant told Deputy Wyatt that she had been there last Thursday, but they argued over her having a new boyfriend and that she had left the apartment, walking. Deputy Wyatt then asked appellant if he could look around the apartment. Appellant consented. Deputy Wyatt testified that the apartment was dirty and he noticed an area with new, white paint, but otherwise nothing stood out as indicating any criminal activity.

Soon after this initial contact with appellant, a search began for Stewart. A headquarters for the search was set up at Abiding Word Church. On March 20, 2007, Sergeant Yvonne Cooper of the Harris County Sheriff's Department, was dispatched to the church, arriving about 6:10 p.m. Upon arriving, she learned appellant was on his way to the church. Sergeant Cooper wanted to interview appellant because he was the last person to see Stewart. When appellant arrived, Sergeant Cooper placed him in her patrol car for his own protection from the gathering crowd. Sergeant Cooper asked appellant if he was willing to provide a written statement and he agreed to do so. However, when asked if he would consent to a search of his apartment and vehicle, appellant refused. Before appellant was driven to the Harris County Sheriff's Department Homicide Division offices, Sergeant Cooper obtained the keys to appellant's apartment and car.

Appellant arrived at the Homicide Division about 8:30 p.m., where he was interviewed by Sergeant Craig Clopton. Once he spoke with Sergeant Clopton, appellant consented to a search of his apartment and car. Sergeant Clopton then notified Sergeant Cooper and she, along with two other detectives, searched appellant's apartment. During the search, the detectives looked for any evidence suggesting that foul play had occurred in the apartment. They noted freshly painted areas in the apartment, which is an indicator that evidence may have been covered up. The detectives also conducted presumptive blood tests which returned positive results behind the bathroom light switch, the base of the toilet, and the western edge of the tub.

On March 21, Quanell X Farrakhan ("Quanell X"), the leader of The New Black Panthers and The New Black Muslim Movement got involved in the search for Stewart. While meeting with Stewart's family, Quanell X received a telephone call from appellant and he agreed to meet with appellant. Quanell X met appellant at a nearby motel and instructed appellant to get into his car. They then travelled to appellant's apartment. Concerned the police might have planted listening devices, Quanell X and appellant went into the apartment bathroom. Inside the bathroom, appellant became visibly more

nervous. Quanell X asked appellant, "… are you sure you do not know what happened to this sister?" At that point appellant said he did not want to talk in the bathroom and asked if they could leave the apartment and talk outside.

Quanell X and appellant left the apartment and walked toward the apartment complex's tennis courts. As they walked, appellant stated: "[m]an they going to kill me. They going to give me the death penalty." To ease his concerns about the death penalty, Quanell X suggested appellant speak to his attorney, Stanley Schneider. After a telephone conversation with Schneider, appellant appeared more comfortable and agreed to take Quanell X to where he had placed Stewart.

At that point, Quanell X contacted the Sheriff's Department and they dispatched Sergeant Miller to accompany appellant and Quanell X. When Sergeant Miller arrived and got into Quanell X's car, appellant directed them to another apartment complex. Once inside that complex, they travelled to the back toward a trash dumpster. The three men exited the car and walked up to the dumpster where Quanell X asked appellant: "Tim, is this where you put her?" Appellant answered "[y]es." Sergeant Miller then placed appellant under arrest.[1]

Appellant was taken to the Harris County Homicide Division where he was placed in an interview room. Once appellant was in the interview room, Sergeant Miller took photographs to document any injuries appellant may have had when he was brought into custody. At that point in time, appellant pointed out a small cut on one of his fingers, which Sergeant Miller photographed.

After being photographed, appellant informed Sergeant Miller that he wanted to speak to his attorney, Stan Schneider. When Schneider arrived outside the Homicide Division offices, Assistant District Attorney Kelly Siegler informed Schneider that he

[1] The dumpster was subsequently searched but Stewart's remains were not found in the dumpster. After appellant confessed to murdering Stewart, the decision was made not to conduct a search for Stewart's remains in the landfill where the contents of the dumpster had been taken.

could not consult with appellant or represent appellant because there was a conflict of interest since Schneider represented Quanell X. Despite that comment by Siegler, Schneider was allowed to briefly meet with appellant. After that meeting, appellant agreed to give his statement to the detectives. During that statement, appellant confessed to killing Stewart.[2]

Following appellant's confession, the detectives obtained a search warrant and searched appellant's apartment again. During this search, the detectives seized, among other items, the drain traps and the garbage disposal.

During the guilt-innocence phase of appellant's trial, DNA analyst Nikki Redmond testified. Redmond testified that she tested blood found on a pair of jeans seized from appellant's apartment. Redmond testified that the blood revealed a DNA profile consistent with appellant and that Stewart could not be excluded as a possible minor contributor to the mixture. Redmond also testified regarding several pieces of bone and enamel that had been located inside the garbage disposal. DNA testing revealed that Stewart could not be excluded as a possible contributor and appellant could be excluded as a possible contributor to the DNA obtained in relation to State's exhibit 167-A , one of the items found in appellant's garbage disposal.

The State also called forensic anthropologist Dr. Jennifer Love to testify as an expert regarding bone trauma and toolmarks found on bone fragments collected below appellant's apartment patio. Dr. Love testified that she is employed by the Harris County Medical Examiner's Office. Dr. Love testified regarding her qualifications, which included master's and doctoral degrees in physical anthropology. While studying for those degrees, Dr. Love also received training in toolmark analysis. Dr. Love also testified that she had worked as a forensic anthropologist since 2003, including working for

[2] Appellant's confession was not introduced during the guilt/innocence phase of the trial.

two years under Dr. Steve Sims, the most respected anthropologist in terms of toolmark analysis, at the Shelby County Medical Examiner's Office in Memphis, Tennessee.

After testifying on her qualifications, Dr. Love explained that forensic anthropology is the application of physical anthropology, which is the study of the human skeleton, to medical-legal cases. Dr. Love also explained that a toolmark is a mark left on bone by an instrument such as a saw or a knife. Dr. Love explained that "toolmark analysis is a morphological study. It is not a test study such as you have with chemistry or DNA. …[I]t is a descriptive analysis." In addition, Dr. Love explained that it is possible to differentiate between human bones and animal bones. Dr. Love testified that it is easy to tell the difference when one examines a complete bone, however it becomes more difficult when dealing with bone fragments. When examining bone fragments, one looks for features such as the thickness of the cortical bone or the pattern of the sponginess in trabecular bones to determine whether the fragment is more likely a human or non-human bone.[3] During her testimony, Dr. Love discussed the differences between antemortem trauma to bones versus perimortem trauma.[4] Dr. Love went on to describe the effect burning has on bones and the differences between blunt force trauma to bones and thermal trauma to bones.

Dr. Love then testified about specific bone fragment exhibits in this case, which consisted of photographs of the fragments. Dr. Love opined that the fragments had been cut with some type of saw at or near the time of death and then they had been burned. While Dr. Love could not testify to a reasonable degree of scientific certainty that the bone fragments were human, she did testify the fragments had characteristics that were consistent with being from a human forearm bone.

[3] Dr. Love explained that bones are made up of two different types of bone material: the thick cortical bones in the center and spongy trabecular bone at the ends.

[4] According to Dr. Love, antemortem trauma is trauma that occurs before death and that is revealed because the bones show signs of healing. In contrast, perimortem trauma occurs after death and that is indicated by the lack of healing in the bone.

At the close of the evidence, the case was submitted to the jury, which found appellant guilty. The case then proceeded to the punishment phase where appellant testified.

During his testimony, appellant admitted he got into an argument with Stewart over her dating Mark and that he strangled her to death. Appellant then testified that he panicked and "decided that [he] needed to cover up [his] tracks." Initially, appellant testified that he went to a nearby hardware store where he bought an electric jigsaw. Appellant then explained he placed Stewart's body in his apartment's bathtub and then dismembered her body using the jigsaw. Using a pair of pliers, appellant pulled out all of Stewart's teeth, which he then burned in his smoker grill on his patio along with some of Stewart's body parts. Appellant placed the remaining body parts in a plastic box, which he slid down the stairs, loaded in his car, and eventually threw in an apartment dumpster. After he disposed of Stewart's body, appellant proceeded to burn the clothes and shoes he had been wearing, as well as Stewart's clothing.

The jury assessed appellant's punishment at ninety-nine years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

DISCUSSION

Appellant brings five issues on appeal. We address them in order.

I. Did the trial court err when it denied appellant's motion to suppress because the State did not exhibit the search warrant to the trial court?

Prior to his trial, appellant filed a motion to suppress evidence he contends was unlawfully seized from his apartment pursuant to a tainted search warrant. In his first issue, appellant asserts the trial court erred when it denied his motion to suppress because "the State failed to exhibit the contested search warrant and affidavit in support of said warrant to the trial judge."

Appellant filed a motion to abate this appeal so the trial court could hold a hearing to determine whether the search warrant and accompanying affidavit were admitted into evidence or admitted into evidence for a limited purpose and to order that a true and correct copy of the search warrant and accompanying affidavit be admitted into evidence for a limited purpose. We then abated this appeal and ordered the trial court to hold such a hearing.

That hearing was held on September 10, 2009. During the hearing, the trial court determined that the search warrant and its contents were addressed and litigated throughout the suppression hearing and the trial. The trial court also determined that the search warrant and accompanying affidavit were admitted for the purposes of the suppression hearing only. The trial court then ordered that a true and correct copy of the search warrant and accompanying affidavit be included in a supplemental clerk's record which was subsequently filed with this court. Appellant's appellate counsel was present at the abatement hearing and lodged no objection to the trial court's handling of the matter.

We conclude appellant's first issue is without merit, and we overrule it.

II. Did the trial court err when it denied appellant's request for a self-defense instruction in the jury charge?

In his second issue on appeal, appellant contends the trial court committed reversible error when it denied his request for a jury charge instruction on self-defense.

A. The law applicable to self-defense.

A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, regardless of what the trial court may think about the credibility of the defense. *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001); *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). Before a defendant is entitled to a self-defense instruction, however, there must be some evidence, when viewed in the light most favorable to the defendant, that will support the claim.

Ferrel, 55 S.W.3d at 591. A defendant need not testify in order to raise a defense. *Boget v. State*, 40 S.W.3d 624, 626 (Tex. App.—San Antonio), *aff'd*, 74 S.W.3d 23, 31 (Tex. Crim. App. 2001).

Entitlement to a self-defense instruction is predicated on the provision of some evidence that the defendant was authorized to utilize force against another. "[A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007). Section 9.32 of the Texas Penal Code provides:

> (a) A person is justified in using deadly force against another:
>
> (1) if the actor would be justified in using force against the other under Section 9.31;[5] and
>
> (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:

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[5] Section 9.31 provides, in pertinent part:

> (a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor:
>
> (1) knew or had reason to believe that the person against whom the force was used:
>
> (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
>
> (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
>
> (C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, robbery, or aggravated robbery;
>
> (2) did not provoke the person against whom the force was used; and
>
> (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used….
>
> (d) The use of deadly force is not justified under this subchapter except as provided in Sections 9.32, 9.33, and 9.34….
>
> Tex. Penal Code Ann. § 9.31 (West Supp. 2009).

(A) to protect the actor against the other's use or attempted use of unlawful deadly force; or

(B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

(b) The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if the actor:

(1) knew or had reason to believe that the person against whom the deadly force was used:

(A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit an offense described by subsection (a)(2)(B);

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

(c) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.

(d) For purposes of Subsection (a)(2), in determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.

Tex. Penal Code Ann. § 9.32 (West Supp. 2009). If the evidence, viewed in the light most favorable to the defendant, does not establish self-defense, the defendant is not entitled to an instruction on the issue. *Ferrel*, 55 S.W.3d at 591.

B. Appellant did not establish all elements of the defense of self-defense.

Appellant argues there was evidence presented during the guilt-innocence phase of his trial that he acted in self-defense and, therefore, the trial court should have included his requested self-defense instruction in the charge. Appellant relies on a single exhibit, the photograph taken by Sergeant Miller when appellant was taken into custody that shows a cut on one of appellant's fingers, and Sergeant Miller's testimony regarding that photograph:

> [Prosecutor]: Did you notice any injuries on [appellant] March 21st when you took him into the Lockwood substation?
>
> [Miller]: He said that he had a cut on his right finger which I took a picture of it.
>
> …
>
> [Defense Attorney]: Sergeant Miller, would you agree with me based on your training and experience that the type of cut depicted in State's Exhibit 267 would be consistent with what we call a defensive wound?
>
> [Miller]: I would agree with that.

Appellant asserts the only reasonable inference from the photograph and the testimony quoted above is that appellant sustained the cut while defending himself from Stewart's aggression. We disagree that, even when viewed in the light most favorable to appellant, that the only reasonable inference from this evidence was that Stewart attacked appellant which required him to use deadly force to protect himself. In addition, even if we were to accept appellant's invitation and infer from this evidence that Stewart cut appellant's finger, the evidence does not establish all of the elements of the defense of self-defense. For example, the mere existence of a cut on appellant's finger does not

establish that appellant reasonably believed that the use of deadly force was immediately necessary to protect appellant from Stewart's use or attempted use of unlawful deadly force. *See* Tex. Penal Code Ann. § 9.32(a)(2). Appellant's cut finger also does not establish (1) that appellant did not provoke Stewart, or (2) that appellant was not engaged in criminal activity at that point in time. *See id.* § 9.32(b)(2) & (3).

Because the evidence cited by appellant does not establish each element of the defense, we hold the trial court did not err when it denied appellant's request for a self-defense instruction in the jury charge. *See Shaw*, 243 S.W.3d at 657–58; s*ee Davis v. State*, 268 S.W.3d 683, 697–98 (Tex. App.—Fort Worth 2008, pet. ref'd) (holding that a doctor's testimony that a cut on the defendant's ear was not a self-inflicted wound did not entitle the defendant to a self-defense instruction because he did not present evidence on all elements of the defense). We overrule appellant's second issue.

III. Did the trial court abuse its discretion when it admitted the expert testimony of forensic anthropologist Dr. Jennifer Love?

Rule 702 of the Texas Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Tex. R. Evid. 702. Pursuant to Rule 702, the trial court, before admitting expert testimony, must be satisfied that three conditions are met: (1) that the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) that the subject matter of the testimony is appropriate for expert testimony; and (3) that 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). These conditions are commonly referred to as (1) qualification, (2) reliability, and (3) relevance. *Id.*

In his third issue, appellant challenges the trial court's decision to admit the testimony of forensic anthropologist Dr. Jennifer Love regarding the science of toolmark

analysis and its application to the facts and evidence in this case. Specifically, appellant argues the State failed to meet its burden to establish that (1) Dr. Love was qualified; (2) her opinion was reliable; and (3) her opinion was relevant. In addition, appellant contends the trial court abused its discretion when it permitted Dr. Love to testify because the probative value of her testimony was substantially outweighed by the danger of unfair prejudice in violation of Rule 403 of the Texas Rules of Evidence. We address each contention in turn.

A. The standard of review.

We use the abuse of discretion standard to review a trial court's decision on whether to allow expert testimony. *Gallo v. State*, 239 S.W.3d 757, 765 (Tex. Crim. App. 2007). Before reversing the trial court's decision, we must find the trial court's ruling was so clearly wrong as to lie outside the realm within which reasonable people might disagree. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008); *Green v. State*, 191 S.W.3d 888, 895 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Absent a clear abuse of that discretion, the trial court's decision to admit or exclude expert testimony will not be disturbed. *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000). Such rulings will rarely be disturbed on appeal. *Vela*, 209 S.W.3d at 136.

B. The law applicable to expert qualifications.

Qualification is distinct from reliability and relevance and should be evaluated independently. *Id.* at 131. The proponent of the expert testimony bears the burden of proving that the expert is qualified. *Turner v. State*, 252 S.W.3d 571, 584 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

The specialized knowledge which qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things. *Id.* at 585. This specialized knowledge possessed by the expert must be beyond that possessed by the average person, "but the gap need not

necessarily be monumental." *Davis v. State*, 313 S.W.3d 317, 350 (Tex. Crim. App. 2010). In addition, the expert's background must be tailored to the specific area of expertise about which he intends to testify. *Vela*, 209 S.W.3d at 133. In other words, to determine whether an expert witness is qualified to testify, the trial court must consider whether the witness has a sufficient background in a particular field and whether that background goes to the very matter on which the witness is to give an opinion. *Id.* Because the possible spectrum of education, skill, and training is so wide, a trial court has great discretion in determining whether a witness possesses sufficient qualifications to assist the jury as an expert. *Rodgers v. State*, 205 S.W.3d 525, 527–28 (Tex. Crim. App. 2006).

C. Dr. Love was qualified to testify as an expert.

The State's evidence in qualifying Dr. Love as an expert in the area of bone trauma and toolmark analysis established that she held a master's and a doctoral degree in physical anthropology.[6] Dr. Love also explained that physical anthropology is the study of the human skeleton. Dr. Love testified that she has worked as a forensic anthropologist since 2003 and has been employed as the forensic anthropology director at the Harris County Medical Examiner's Office since 2006. According to Dr. Love, forensic anthropology takes the methods of physical anthropology and applies them to individuals in medical-legal cases instead of to the entire population.

Turning specifically to toolmark analysis, Dr. Love testified that the science of toolmark analysis is recognized by the scientific community and there have been articles published on toolmark analysis since the early 1970's. Dr. Love testified that the science of toolmark analysis has been recognized as reliable by the scientific community. Dr. Love went on to summarize what is meant by the term toolmark:

[6] Dr. Love testified that a toolmark is a mark that is left on bone by an instrument such as a saw or a knife.

> Toolmark analysis is a morphological study. It is not a test study such as you have with chemistry or DNA. So, it is a descriptive analysis. There are parameters that are published that are met to show that it is, in fact, a toolmark such as what we talk about in this case. The width of the — the width of the mark, the depth of the mark, the formation of the floor of the mark also we'll see that— so we have the mark, the partial mark. Immediately to the right of the partial mark is a complete mark. And there are regular striations — or irregular striations but steps in that mark which is also characteristic of a toolmark. So, when these established characteristics are identified, then it can be considered a toolmark.

Dr. Love also testified that as part of her education and training as a physical anthropologist, she received training and education in identifying toolmarks. While Dr. Love did testify that there is no recognized proficiency testing in toolmark analysis, she explained that she took coursework on that subject. In those courses, Dr. Love explained,she had to frequently present her knowledge and ability to identify toolmarks in order to pass.

Dr. Love also testified that she worked for several years with Dr. Steve Sims, who was the head forensic anthropologist at the Shelby Coundy Medial Examiners Office in Memphis, Tennessee. According to Dr. Love, Dr. Sims was the leading anthropologist in the field of toolmark analysis.[7] While she worked with Dr. Sims, he received cases from throughout the United States and Canada and she worked with him on those cases. Dr. Love explained that while she worked with Dr. Sims, he reviewed and approved all of her work, including work involving toolmark analysis.

Finally, Dr. Love testified that she has appeared as an expert in court many times on the subjects of both bone trauma and toolmark analysis.

Based on the above, we conclude Dr. Love established that she had specialized knowledge, training, and experience in toolmark analysis and that knowledge went to the

[7] Dr. Love also testified that, prior to joining the Harris County Medical Examiner's Office, she had replaced Dr. Sims as the head forensic anthropologist at the Shelby County Medical Examiner's Office in Memphis, Tennessee.

very matter on which she was asked to render an opinion in this case. Therefore, we hold the trial court did not clearly abuse its discretion when it overruled appellant's objection based on Dr. Love's qualifications.

D. Dr. Love's testimony was both reliable and relevant.

Texas Rule of Evidence 705(c) governs the reliability of expert testimony and states that "[i]f the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible." Tex. R. Evid. 705(c). To be considered reliable, evidence from a scientific theory must satisfy three criteria: "(a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question." *Coble v. State*, No. AP-76,019, 2010WL3984713, at *10 (Tex. Crim. App. October 13, 2010) (quoting *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1997)). When "soft" sciences are at issue, the trial court must inquire "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." *Id.* (quoting *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998)). This inquiry is somewhat more flexible than the factors, outlined in *Kelly v. State*, applicable to the hard sciences.[8] *Id.* The general principles announced in *Kelly* apply, but the specific factors outlined in those cases may, or may not apply depending upon the context. *Id.* Regardless, under both

[8] *Kelly v. State*, 824 S.W2d 568, 573 (Tex. Crim. App. 1992). The factors found in *Kelly* include: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Id.*

Kelly and *Nenno*, reliability should be evaluated by reference to the standards applicable to the particular professional field in question. *Id.*

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tex. R. Evid. 401. To be relevant, evidence must be both material and probative. *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001). To be material, the evidence must be addressed to the proof of a fact of consequence to the determination of the action. *Id.* To be probative, the proffered evidence must make the evidence of the fact more or less probable than it would be without the evidence. *Id.*

Since Stewart's remains were not recovered and the State elected not to use appellant's confession during the guilt/innocence phase of the trial, the State needed to provide the jury with evidence that Stewart was in fact dead and not just missing. The State called Dr. Love for that purpose.

After she had testified about her qualifications, Dr. Love explained the limits on differentiating between human bones and animal bones as well as the differences between antemortem trauma to bones versus perimortem trauma. In addition, Dr. Love testified about the effect burning has on bones and the noticeable differences between blunt force bone trauma and thermal bone trauma. Dr. Love also explained the methods used when performing a toolmark analysis.

Dr. Love then turned her attention to the bone fragments found on the ground outside appellant's apartment. Initially, Dr. Love testified that the bone fragments were too small or badly burned to obtain any DNA. She then described the bone trauma and toolmarks found on those bone fragments. Dr. Love opined that the toolmarks on the bone fragments were consistent with being made by either a hunting knife or a saw. In addition, Dr. Love opined that the bone fragments had characteristics consistent with being

human and showed no signs of healing, indicating that the cuts occurred at or near the time of death.

Based on the above, we conclude Dr. Love's testimony was reliable. In addition, we hold Dr. Love's testimony was relevant as it provided some evidence proving the State's theory of the case: that appellant had killed Stewart, that he had then dismembered her body using a knife and/or a saw, and had then burned some or all of her body in an effort to conceal his crime.

E. Was the probative value of Dr. Love's testimony substantially outweighed by the danger of unfair prejudice?

In the final part of his third issue, appellant asserts the trial court's decision to admit Dr. Love's testimony violated Rule 403 because the bone fragments she testified about were never identified as Stewart's or even human. According to appellant, this made Dr. Love's testimony "nothing more than inflammatory testimony designed to rile the jurors" and would induce them to rely on emotion rather than the facts when deciding appellant's guilt or innocence.

A trial court's ruling whether to exclude evidence under Rule 403 of the Texas Rules of Evidence is measured by an abuse of discretion standard and will not be reversed if the ruling is within the zone of reasonable disagreement. *Andrade v. State*, 246 S.W.3d 217, 227 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tex. R. Evid. 401. Relevant evidence may be excluded by the trial court under Rule 403 "if 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 the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Andrade*, 246 S.W.3d at 227. In conducting a Rule 403 analysis, a trial court must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that the presentation of the evidence will consume an inordinate amount of time or repeat evidence already admitted. *Casey v. State*, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007).

a. Probative Force and Need for the Evidence

We begin with an evaluation of the probative value of Dr. Love's testimony; that is, the inherent probative force of the evidence coupled with the proponent's need for that item of evidence. *Id.* at 879. Probative force refers to how strongly the evidence serves to make more or less probable the existence of a fact of consequence to the litigation. *Id.* Here, the State utilized Dr. Love's testimony to tie together the many pieces of evidence that came from many different sources to establish that Stewart was indeed dead, that she had died in appellant's apartment, and that she had been killed, dismembered, and burned by appellant. We conclude that Dr. Love's testimony was highly probative and the State's need for the testimony was great.

b. Rule 403 Counterfactors

We now turn to balancing the probative value of Dr. Love's testimony against the Rule 403 counterfactors. *Casey*, 215 S.W.3d 883.

1. Potential to Impress the Jury to Decide on Improper Basis

We begin by examining whether the contested testimony has the potential to impress the jury in an irrational but indelible way. *Andrade*, 246 S.W.3d at 228. Rule 403 does not exclude all prejudicial evidence. It focuses only on the danger of unfair prejudice. *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005). Unfair prejudice refers only to relevant evidence's tendency to tempt the jury into finding guilt on grounds apart from the proof of the offense charged. *Id.* The prejudicial effect may be created by the tendency of the evidence to prove some adverse fact not properly in issue or unfairly to excite emotions against the defendant. Appellant's argument is based on the latter. However, Dr. Love's testimony was not inflammatory as it was introduced to prove that Stewart was dead and what happened to her body, and it did so in a straightforward manner not designed to influence the jury in an emotional manner. We conclude Dr. Love's testimony did not have a great potential to impress the jury in an irrational way and would not tempt them into finding guilt on improper grounds. *See Santellan v. State*, 939 S.W.2d 155, 169–70 (Tex. Crim. App. 1997) (holding that admission of evidence of abuse of a corpse did not violate Rule 403 as it was vitally important to proving prosecution's case). This factor does not weigh against the admission of Dr. Love's testimony.

2. Likelihood of Confusion of the Issues

Next, we inquire as to the tendency of the evidence to confuse or distract the jury from the main issues. *See Casey*, 215 S.W.3d at 880. Because Dr. Love's evidence directly addressed the issue of whether Stewart was dead and what had happened to her body, facts essential to proving the charged offense, we conclude it could not confuse or distract the jury from the issue before them. This factor does not weigh against admitting Dr. Love's testimony.

3. Danger of Misleading the Jury

Third, we examine any tendency of the challenged testimony to be given undue weight by a jury on any basis other than emotional grounds. *Gigliobianco v. State*, 210

S.W.3d 637, 641 (Tex. Crim. App. 2006). "For example, 'scientific' evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence." *Id.* Here, we conclude this factor actually weighs in favor of the admission of Dr. Love's testimony as she provided key evidence proving that Stewart was dead. The fact her testimony addressed a particularly gruesome crime does not make it overly inflammatory or likely to mislead the jury. This factor does not weigh against admission.

4. Risk of Undue Delay

Finally, we examine the likelihood that Dr. Love's testimony consumed an inordinate amount of time or merely repeated evidence already admitted. *Id.* at 642. This factor concerns the efficiency of the trial proceeding rather than the threat of an inaccurate decision. *Id.* at 641. The time involved in presenting Dr. Love's testimony to the jury was minimal when compared to the whole trial as it runs a mere 47 pages out of a reporter's record that covers 19 volumes[9] totaling 2,841 pages. In addition, many of the 47 pages were consumed by argument to the bench regarding the admissibility of Dr. Love's testimony. We also conclude the evidence was not cumulative of other evidence as it tied together much of the other evidence to establish that appellant had killed Stewart inside his apartment, dismembered her body, and then burned all or some part of it in his barbecue grill on his apartment's patio. We conclude this factor also does not weigh against admission of Dr. Love's testimony.

Having considered all of the Rule 403 factors, we hold the trial court did not abuse its discretion when it denied appellant's Rule 403 challenge and permitted Dr. Love to testify.

Having addressed, and rejected each of appellant's arguments found in his third issue, we overrule appellant's third issue on appeal.

[9] There are also two volumes of exhibits stretching 741 pages and holding more than 250 exhibits.

IV. Is the evidence legally and factually sufficient to support the conviction?

In his fourth issue, appellant contends the evidence is both legally and factually insufficient to support his conviction. We disagree.

A. The standard of review.

A majority of the judges of the Texas Court of Criminal Appeals have determined that "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010) (plurality op.).[10] Therefore, in this case, we do not separately refer to legal or factual sufficiency.

In a sufficiency review, we view all the evidence in the light most favorable to the 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, 99 S.Ct. 2781, 2789, 61 L. Ed. 2d 569 (1979); *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). The jury, as the sole judge of the credibility of the witnesses, is free to believe or disbelieve all or part of a witness' testimony. *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses to, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Reconciliation of conflicts in the evidence is within the jury's discretion, and such conflicts alone will not call for reversal if there is enough credible evidence to support a conviction. *Losada v. State*, 721 S.W.2d 305, 309 (Tex.

[10] Nonetheless, this does not alter the constitutional authority of the intermediate courts of appeal to evaluate and rule on questions of fact. *See* TEX. CONST. art. V, § 6(a) ("[T]he decision of [courts of appeal] shall be conclusive on all questions of fact brought before them on appeal or error.")

Crim. App. 1986). An appellate court may not re-evaluate the weight and credibility of the evidence produced at trial and in so doing substitute its judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Inconsistencies in the evidence are resolved in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Harris v. State*, 164 S.W.3d 775, 784 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

B. The evidence is sufficient to support the conviction.

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual or intends to cause serious bodily injury[11] and commits an act clearly dangerous to human life that causes the death of an individual. Tex. Penal Code Ann. § 19.02(b)(1) & (2). Appellant was indicted for the murder of Stewart under both section 19.02(b)(1) and section 19.02(b)(2) by either a manner and means unknown to the jury or by cutting her with a knife. Each of these constitutes an alternative means of committing murder and the jury could convict appellant under either of the theories. *See id.; Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1987) ("Because appellant's indictment did not allege different offenses but only alleged different ways of committing the same offense, the court properly furnished the jury with a general verdict form."). As the Court of Criminal Appeals has consistently held, "[W]hen multiple theories are submitted to the jury, the evidence is sufficient to support the conviction so long as the evidence is sufficient to support conviction for one of the theories submitted to the jury." *Guevara v. State*, 152 S.W.3d 45, 52 (Tex. Crim. App. 2004) (citing *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991)).

[11] "Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code Ann. § 1.07(46) (West Supp. 2009).

The corpus delecti of murder is established if the evidence shows the death of a human being caused by the criminal act of another. *Fisher v. State*, 851 S.W.2d 298, 303 (Tex. Crim. App. 1993). The State may prove the corpus delecti by circumstantial evidence. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). The State's inability to produce and identify the body or remains does not preclude a murder conviction. *Id.* On appeal, appellant does not challenge the evidence supporting the fact that Stewart was dead; instead, he focuses his challenge on the argument that the jury had no evidence that a criminal act occurred which caused Stewart's death. We disagree.

The State presented circumstantial evidence to establish that appellant committed the criminal act of murder. This evidence begins with the fact that appellant and Stewart had a chaotic and violent relationship. One time Stewart called her sister crying and upset saying that appellant had "become physical with her and had his hands around her neck…he told her that he was going to kill her and that he was not going to let her out of the apartment." One of Stewart's sisters later observed finger marks on Stewart's neck. When Stewart began seeing someone else while she was away at college, appellant was not happy with this development. The week of her disappearance, while Stewart was home from college on spring break, appellant and Stewart fought and he told her "he would have to get out of Texas before he ended up killing her." In addition, the evidence shows that Stewart was picked up by appellant early on the morning of March 15, 2007, and was never heard from or seen again.

After Stewart had disappeared, appellant admitted to being the last person to see her, claiming she left his apartment on foot after they got into an argument about her new boyfriend. The State then introduced evidence from various witnesses of events that occurred in and around appellant's apartment after Stewart had disappeared. This evidence included the following:

Even though the March weather was cool and pleasant, appellant had his windows open, his patio door open, fans running in his apartment, and his air conditioner on.

Water had run continuously at full blast in appellant's bathtub for hours.

A loud pounding noise occurred in appellant's dining room/kitchen area for at least a half hour.

Following the pounding, appellant's garbage disposal ran at least five minutes straight or long enough for his neighbors to notice and find it "a little strange."

Appellant barbecued constantly for a couple of days on his patio.

Despite having his neighbor's grill on his patio and despite normally sharing his barbecue with his neighbor, the evidence shows that, on this occasion, appellant told his neighbor he was cooking for a wedding and he could not share.

The neighbor testified that he never saw his grill again.

Appellant told another neighbor he was barbecuing "meat."

While appellant was barbecuing, his neighbors testified they noticed a different color and smell to appellant's grilling; that the smoke was "not normal" and "dark," and the smell was "rank," "horrific," "foul," "worse than like singed hair or tires."

The evidence also shows that while appellant was barbecuing, the fire got out of control and the fire department was called to his apartment. The firefighters who responded were reluctantly admitted into appellant's apartment to go to the patio to check on the fire. The firefighters observed the bathtub was partially filled with water and had meat floating in it. The meat appeared to be rib bones and two smaller pieces of meat. In addition, the firefighters saw what appeared to be burnt chicken or Cornish game hens on the stove in appellant's kitchen.

The evidence also reveals that, after the firefighters left, appellant continued barbecuing and the smell was the same as before.

During the same time, the evidence shows that one of appellant's neighbors smelled ammonia from appellant's apartment and that appellant would not allow her inside his apartment to use his phone when it was customary for him to do so.

The evidence demonstrates that within three days of Stewart's disappearance, appellant was seen carrying trash bags with "box shaped objects" inside to his car, and appellant threw away both grills, including the grill that did not belong to him.

Stewart's mother and sister arrived at appellant's apartment along with a Harris County Deputy several days after anyone had last heard from Stewart. Appellant allowed the deputy to do a walk-through of his apartment where the deputy observed areas with fresh paint or primer. Appellant called another of Stewart's sisters angry that Stewart's parents had shown up with cameras and thinking that he had "cut her up and put her in my wall."

Eventually a search was organized to look for Stewart. The searchers set up at a church near appellant's apartment. While appellant never participated in the search activities, he was seen driving by the church several times.

Five days after Stewart disappeared, appellant consented to the search of his apartment by the police. During this search, the police noticed newly painted areas as well as bleach spots throughout the apartment. They also observed that appellant's bathroom was very clean and the tile around the bathtub had been recently painted. The police also found empty bottles of ammonia, bleach, and peroxide in appellant's apartment. The police conducted presumptive tests for possible DNA or blood evidence, which reacted heavily in the bathroom.

The State also introduced evidence that appellant met with Quanell X. They went into the bathroom of his apartment where appellant became nervous and told Quanell X he did not wish to talk in the bathroom. Once outside his apartment, appellant stated: "They going to kill me man…they going to give me the death penalty." Appellant also cried but

appeared comforted after talking to Quanell X's attorney on the telephone. Eventually, appellant agreed to show Quanell X where he had put Stewart. As they were driving to that location, appellant stated: "Ty [Stewart] lied to [me]" and "that bitch used me." Eventually, appellant directed Quanell X's vehicle to a dumpster located inside an apartment complex. The evidence shows that appellant then walked up to the dumpster where, when asked if that was where he had put Stewart's body, responded, "Yes."

The evidence also shows that after he was arrested, appellant attempted to commit suicide.

The record also includes evidence that blood found on a pair of jeans from appellant's apartment was consistent with Stewart's DNA profile. The evidence in the record also includes bone and enamel fragments recovered from appellant's garbage disposal. The DNA profile from these bone and enamel fragments was consistent with Stewart's. In addition, the DNA profile from the evidence retrieved from between the boards of appellant's patio was also consistent with Stewart's DNA.

Dr. Love testified that the bone fragments found below appellant's apartment patio had saw and/or knife marks and were consistent with the thickness of human bones. In addition, Dr. Love testified that a bathtub could act like an autopsy table and if someone dismembered a body in a bathtub, fluids from the body could be washed down the drain. Dr. Love also testified that even a small person could dismember a human body with a handsaw. Finally, Dr. Love testified that it was not easy for an untrained individual to tell the difference between human and pig ribs.

Based on the totality of the foregoing, we hold the evidence is sufficient for a rational jury to conclude that appellant, by a manner and means unknown, intentionally caused Stewart's death or intended to cause her serious bodily injury that resulted in her death. We overrule appellant's fourth issue.

V. Did the trial court err when it denied appellant's motion to suppress because the affidavit supporting the warrant was allegedly tainted by the inclusion of information from appellant's confession that appellant alleges was obtained in violation of his constitutional and statutory rights to counsel?

Appellant bases his argument under his fifth issue on events that occurred following his arrest next to the apartment dumpster. After Sergeant Miller placed appellant under arrest, he read appellant his *Miranda*[12] warnings. Eventually, appellant was taken to an interview room at the Sheriff Department's Lockwood Station. On videotape, appellant told Sergeant Miller he wanted to speak to an attorney before "help[ing] y'all close this case." Appellant then told Sergeant Miller that his attorney was Stanley Schneider, the same attorney he had spoken to when he was with Quanell X. Sergeant Miller stopped the interview and videotape at that point in time.

Meanwhile, Quanell X had called Schneider and asked him to meet appellant at the Lockwood Station. Because he was going to be delayed, Schneider sent another attorney, Rob Fickman, to meet with appellant; however, Schneider arrived not long after Fickman. A confrontation occurred when Assistant District Attorney Siegler initially prohibited both Fickman and Schneider from meeting with appellant because she believed there was a conflict as Schneider had an ongoing professional relationship with Quanell X, a likely witness at appellant's trial. Eventually, Siegler relented and allowed Schneider to meet with appellant. Schneider met with appellant for approximately ten to fifteen minutes. Quanell X was also allowed to meet with appellant for a few minutes after appellant met with Schneider.

After these meetings, Sergeant Miller began the administrative process of booking appellant into jail. At that point, appellant told Sergeant Miller he wanted to give his statement without an attorney because he wanted to tell the truth. Appellant was then read

[12] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

his *Miranda* warnings a second time and represented he was not coerced or forced to give a statement. Appellant then gave his videotaped confession. Information from that confession was then used on the affidavit supporting the Sheriff Department's application for a search warrant for appellant's apartment. Numerous items of evidence were then seized from appellant's apartment using that search warrant.

Appellant's fifth issue begins with his contention that the State obtained his confession in violation of his right to counsel under both the United States and Texas constitutions as well as his right to counsel under article 38.23 of the Texas Code of Criminal Procedure. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 10; Tex. Code Crim. Proc. Ann. art. 38.23 (West 2005). Appellant then argues that the trial court erred when it denied his motion to suppress the evidence seized from his apartment because the affidavit supporting the search warrant contained information from this tainted confession. According to appellant, without the information from the allegedly tainted confession, the search warrant lacked the requisite probable cause and was invalid under article 18.01 of the Texas Code of Criminal Procedure and therefore violated his federal and state constitutional rights to be free from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; Tex. Code Crim. Proc. Ann. art. 18.01(c) (West Supp. 2009) (providing that an affidavit supporting a search warrant must set forth sufficient facts to establish probable cause).

A. The standard of review.

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review, giving almost total deference to the trial court's findings of historical fact supported by the record and reviewing de novo the trial court's application of the law of search and seizure. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The trial judge is the exclusive trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony at the suppression hearing. *State v. Ross*, 32 S.W.3d 853, 855 (Tex.

Crim. App. 2000). As the trier of fact, the trial court is free to believe or disbelieve all or any part of a witness's testimony, even if the testimony is uncontroverted. *Id.*; *Marsh v. State*, 140 S.W.3d 901, 905 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). In reviewing a trial court's ruling on a motion to suppress, an appellate court must view the evidence in the light most favorable to the trial court's ruling. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). When, as here, the trial court fails to make explicit findings of fact, we imply fact findings that support the trial court's rulings so long as the evidence supports these implied findings. *Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007). If the trial court's ruling is reasonably supported by the record and is correct under any theory of law applicable to the case, the reviewing court will sustain it upon review. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

B. The trial court did not abuse its discretion when it denied appellant's motion to suppress.

The Fifth Amendment right to counsel requires that once a suspect has expressed his desire to deal with police only through counsel, he may not be subjected to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Cross v. State*. 144 S.W.3d 521, 526 (Tex. Crim. App. 2004). A criminal suspect is deemed to have waived his previously-invoked right to counsel only when (1) the suspect himself initiates further communication with the police, and (2) after he re-initiates communication with the police, the suspect validly waives his right to counsel. *Id.* at 527. Once this two-step waiver requirement is shown, the suspect has countermanded his original election to speak to authorities only with the assistance of counsel. *Id.* Thus, the critical inquiry is whether the suspect has been further interrogated before he reinitiated conversations with law enforcement officials. *Id.* at 529. If he has not, the *Edwards* bright line rule is not violated. *Id.*

Here, the record demonstrates that Sergeant Miller ceased interviewing appellant once he invoked his right to counsel. The record further establishes that appellant was not approached again by the police until Sergeant Miller began administrative booking procedures. Approaching appellant to carry out administrative booking procedures did not violate the *Edwards* rule because these procedures are not considered custodial interrogations because they do not normally elicit incriminating responses. *See id.* at 524–25 n.5. The record further demonstrates that during this process, appellant asked Sergeant Miller if he wanted his statement. When Sergeant Miller asked appellant what he meant, appellant said "I want to give you a statement." After Sergeant Miller explained that because appellant had invoked his right to an attorney, he could not ask him any more questions without an attorney present, appellant replied: "I wanted to give you a statement without an attorney because I want to tell you the truth. I'll tell you my side of the story." Finally, the record establishes that before starting his interview of appellant, Sergeant Miller again read appellant his rights; asked appellant if he wished to waive those rights; and appellant replied that he did. We conclude that the requirements of *Edwards* were met and that appellant's confession was not obtained in violation of his constitutional and statutory right to counsel. Since appellant's confession was not obtained in violation of his right to counsel, the probable cause affidavit supporting the search warrant for appellant's apartment was not tainted and the trial court did not abuse its discretion when it denied appellant's motion to suppress. We overrule appellant's fifth and final issue.

CONCLUSION

Having overruled each of appellant's issues on appeal, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Brown.

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