Affirmed and Memorandum Opinion filed February 25, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00677-CR

JORGE ALBERTO AMEZQUITA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 1189721

M E M O R A N D U M   O P I N I O N

A jury found appellant Jorge Amezquita guilty of capital murder, and he was automatically sentenced to life imprisonment without the possibility of parole. Appellant contends that: (1) the evidence is insufficient to support the conviction; (2) there is no evidence that the two murders were committed in the "same criminal transaction;" (3) the trial court erred by admitting into evidence statements appellant made while in custody; (4) the trial court erred by allowing

evidence of appellant's extraneous offenses; (5) the trial court erred by denying appellant's *Batson* challenge; and (6) life without parole is an unconstitutional sentence under the United States and Texas Constitutions. We affirm.

BACKGROUND

Leo Gomez Jr. and two teenage friends went to Gomez Jr.'s house around 7:00 p.m. on June 24, 2008. Gomez Jr. went inside to change clothes before the three went out to play basketball. While Gomez Jr.'s friends were waiting outside, a man came out of the house with a shirt covering his face. The man pointed a gun at the teenagers and demanded that they move Gomez Jr.'s truck, which was blocking the driveway. One of the teenagers moved the truck, at which point the masked man loaded several bags into the bed of one of the Gomezes' pickup trucks and drove away.

One of the teenagers went inside the house and found Gomez Jr. in his bedroom with his hands and feet tied up with game console controller cords. Gomez Jr. had been shot in the head, but was still alive.

The teenagers flagged down a passing police officer. When officers cleared the house, they found Gomez Jr.'s parents, Leo Gomez Sr. and Milagros Vanegas-Martinez, dead in their bedroom. Gomez Sr. had been shot twice in the head at close range through a pillow. Vanegas-Martinez had eleven stab wounds to her neck. She also had three plastic bags tied and wrapped around her head, and had been shot at close range through the bags.

During the investigation, the lead detective spoke with Sergio Pena, Vanegas-Martinez's adult son from a previous marriage. When the detective told Pena how Gomez Sr. and Vanegas-Martinez were killed, Pena became very emotional and immediately identified appellant as the person Pena believed had committed the murders.

Pena had worked for Gomez Sr.'s demolition company for a number of years. Appellant had also worked for Gomez Sr.'s company as a hydraulics mechanic. Pena explained to police that appellant had once described to Pena how he would commit a murder. According to Pena, appellant had explained that "he would use, some zip-ties, like rope, duct tape, like the gray duct tape that you use in construction, bags, all sorts of things."[1] Pena said that appellant told him, "man, you got to get the good plastic bags, kind of hard, you know, heavy duty so you can put around them and they won't be able to poke them when they can't breathe." Pena also said that appellant had provided other details, such as that appellant would use pillows, and that he would "never shoot anybody in the body," but instead would shoot them in the head to "make sure they're dead."

During their investigation, police also learned that appellant and Gomez Sr. had opened a bar together in January 2008. Appellant was responsible for the day-to-day operations of the bar. Shortly thereafter, appellant and Gomez Sr. had a falling-out, and the bar was closed in February 2008.

Around 11:00 p.m. on June 24, 2008 — approximately four hours after Gomez Sr. and Vanegas-Martinez were murdered — appellant checked into a Motel 6 in San Antonio using his mother's name. Appellant started working and living on a horse ranch near San Antonio several days later using the name "George Amestita."

Police eventually located and arrested appellant at the horse ranch on December 10, 2008. A jury found appellant guilty of the capital murder of Vanegas-Martinez and Gomez Sr. in August 2014, and the trial court automatically

[1] Pena further testified at trial that appellant showed him a bag containing the items appellant believed would be useful to kill someone, including duct tape, "mechanical gloves," rope, zip-ties, and bags.

assessed punishment at life imprisonment without the possibility of parole. This appeal ensued.

ANALYSIS

I. Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence supporting his conviction in his first and second issues. In his first issue, appellant generally contends that the evidence was insufficient to prove that he committed the murders. In his second issue, appellant specifically challenges the sufficiency of the evidence supporting the jury's conclusion that the two murders were committed "during the same criminal transaction."

A. Standard of Review

The legal sufficiency standard of review is the only standard we 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, 912 (Tex. Crim. App. 2010).[2] When reviewing the legal sufficiency of the evidence, we consider all of the evidence in the light

[2] Appellant additionally contends that the Texas Court of Criminal Appeals's adoption of a single, legal sufficiency standard of review "deprives Appellant of a protection afforded him under TEX. CONST. Art. V, Sec. 6: 'The decision of a Texas Court of Appeals shall be conclusive on all questions of fact brought before them on appeal or error.'" Appellant does not brief the issue, and has therefore waived it. *See* Tex. R. App. P. 38.1(h), (i). Regardless, the Texas Court of Criminal Appeals has determined that "there is no meaningful distinction between a *Clewis* factual-sufficiency standard and a *Jackson v. Virginia* legal-sufficiency standard," and that "a rigorous and proper application of the *Jackson v. Virginia* legal-sufficiency standard is as exacting a standard as any factual sufficiency standard." *Brooks*, 323 S.W.3d at 906, 912. We are bound to follow the Court of Criminal Appeals, and therefore apply the single *Jackson* legal sufficiency standard. *See id.* at 912; *see also Kiffe v. State*, 361 S.W.3d 104, 109-10 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (rejecting appellant's constitutional challenge to the single standard of review announced in *Brooks*).

most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In making this review, we consider all evidence in the record, whether it was admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015).

The jury is the sole judge of the credibility and weight to be attached to the testimony of witnesses. *Temple*, 390 S.W.3d at 360. We defer to the jury's responsibility to fairly resolve or reconcile conflicts in the evidence, and we draw all reasonable inferences from the evidence in favor of the verdict. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). In conducting a sufficiency review, 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. *Young v. State*, 358 S.W.3d 790, 801 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

B. Discussion

Appellant was convicted of the offense of capital murder; specifically, that he murdered more than one person during the same criminal transaction. *See* Tex. Penal Code Ann. § 19.03(a)(7)(A) (Vernon Supp. 2015). Contending that the evidence is insufficient to sustain his conviction, appellant argues that no murder weapon was recovered; no witnesses saw appellant at the residence at the time of the murders; neither appellant's fingerprints nor his blood was found inside the Gomez home; appellant provided an explanation for his DNA found at the scene;

and appellant provided an alibi for his whereabouts — that he was in San Antonio at the time of the murders.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant committed the offense of capital murder.

First, the jury heard testimony providing a possible motive for the murders: appellant and Gomez Sr. had a falling out regarding their business, resulting in a confrontation between them.[3]

Additionally, Pena testified that appellant had described in detail how he would commit murder. Appellant told Pena that he would use plastic bags over the victim's head; that he would bind the victim with rope, duct tape, or zip-ties; that he would use "all kind of stuff around their house," including pillows; and that he would shoot the victim in the head to "make sure they're dead." The details of appellant's description closely matched details of the crime scene.[4] Gomez Sr. had been shot twice in the head at close range through a pillow. Vanegas-Martinez had three plastic bags tied and wrapped around her head, and had been shot at close range through the bags. Gomez Jr. was found with his hands and feet bound with a video game controller cord from his room. Gomez Jr. had also been shot in the head.

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[3] The jury also heard testimony that appellant was aware that Gomez Sr. frequently had large amounts of cash in his possession, and that an empty envelope with "$13,300" written on the front was found at the crime scene.

[4] Pena initially spoke with police shortly after the murders, but did not identify appellant as the possible assailant until a subsequent conversation when police described how the murders had been committed. According to Detective Jernigan, Pena at that point "became very emotional, became ashen white. He started to cry. And he immediately stated to [Detective Jernigan], It was [appellant]. He did this." Pena then told police of appellant's discussion of how he would commit a murder.

Likewise, Pena testified that appellant told him that appellant would wear gloves, and that appellant had even showed Pena a bag of items — which included gloves — that appellant would use to commit murder. A rational jury could have determined that appellant's fingerprints were not found in the house as the result of his wearing gloves, consistent with Pena's testimony.

One of Gomez Jr.'s friends described the man who came out of the house with a shirt over his face as "hefty," "a little bit under six feet" tall, and Hispanic. Appellant is Hispanic, five feet eleven inches tall, and testified that at the time of the murder he weighed 310 pounds.

The man who came out of the Gomezes' house got into a truck belonging to Vanegas-Martinez and drove away. Police located the truck abandoned in a nearby church parking lot within 30 minutes of learning of the murders. DNA testing of the interior driver's side door handle of the truck indicated that appellant was a possible major contributor, with the probability that the DNA belonged to an unrelated, randomly selected Hispanic person being 1 in 14.9 quadrillion. Appellant's DNA also was consistent with DNA from the truck's exterior door handle; the probability that the DNA belonged to an unrelated, randomly selected Hispanic individual was 1 in 6,381,000,000. Appellant was a possible contributor to DNA found on the truck's steering wheel; the DNA there was consistent with 1 in 194,300 Hispanics.

Appellant attempted to explain the presence of his DNA in Vanegas-Martinez's truck by contending that he visited Gomez Sr. and Vanegas-Martinez on June 21, 2008. Appellant testified that he first went to the Gomezes' house, and then he, Gomez Sr., and Vanegas-Martinez went to eat lunch at a nearby restaurant. Appellant testified that, as they walked out of the house, Gomez Sr. threw appellant the key to Vanegas-Martinez's truck and told appellant to drive.

However, the jury heard other testimony that Vanegas-Martinez was possessive of her truck and did not let others drive it. The jury, as the sole judge of credibility and weight to be attached to the testimony of witnesses, was free to disbelieve appellant's explanation for why his DNA was found in the stolen truck.

Appellant's DNA was also consistent with DNA found on the video game controller from which the cord used to tie up Gomez Jr. was taken. The probability that the DNA could have come from an unrelated, randomly selected Hispanic was 1 in 25. Appellant attempted to explain the presence of his DNA on the video game controller by contending that he had visited the Gomezes on two occasions before the murders and played video games with Gomez Jr. The jury was free to disbelieve appellant's testimony.

Appellant offered an alibi that he was in San Antonio at the time of the murders. Appellant testified that he left Houston on the morning of June 23, 2008 — the day before the murders — and drove to San Antonio. Appellant testified that he spent June 23 with a woman named Cathy, who had been his girlfriend for four months. Appellant could not remember Cathy's last name. Appellant testified that Cathy rented a hotel room the night of June 23 under her name and that appellant stayed with her. Appellant contends that he spent the next day — the day of the murders — drinking with Cathy.

At the time, appellant was renting a house in San Antonio under a fictitious name.[5] However, appellant had not paid rent on the house for several months and the owners had initiated eviction proceedings. Appellant contends that on June 24, after spending the day with Cathy, they drove by the house he was renting and saw the eviction notice on the door. Appellant contends that, when they entered the

[5] Appellant contended he used a fictitious name to rent the house because he had a bad credit rating.

house, they learned that the utilities had been shut off. Appellant contends that, upon learning the utilities were off, he and Cathy drove to a Motel 6 to rent a room for the night.

The jury was entitled to discount appellant's alibi testimony based on numerous issues and inconsistencies. First, appellant could not remember the last name of his alibi witness, Cathy, or remember the address where she lived, despite having allegedly dated her for four months. The only testifying witness who could place appellant in San Antonio on the evening of the murders — the son of the rental property owners — testified that he met up with appellant around 11:00 or 11:30 p.m. on June 24. Based on this testimony, the jury reasonably could conclude that appellant had sufficient time to drive to San Antonio from Houston after committing the murders. Appellant told the witness an elaborate story about how he had been locked up in a Mexican jail for two months before coming to San Antonio. Appellant contends he told the admittedly false story because he "didn't want [the witness] to ask [him] questions."

Appellant initially stated that he rented a room at the Motel 6 on the evening of the murder instead of staying at his rental house because the utilities at the rental house had been turned off. Appellant later testified that the utilities had not been cut off. Appellant rented the room at the Motel 6 under his mother's name, Maria Amezquita. When asked why he registered at the hotel under his mother's name, appellant replied, "That was the driver's license I had."

Several days after the murders, appellant started working and living on a horse ranch near San Antonio using the name "George Amestita" and a false address. Appellant testified that he provided the false information because he "was drunk."

Based on the foregoing evidence, a rational jury reasonably could have rejected appellant's alibi testimony. A rational jury also could have found that appellant committed the charged offense beyond a reasonable doubt based on DNA evidence; eyewitness testimony that the suspect matched appellant's general description; similarities between how appellant said he would conduct a murder and how the murders were actually carried out; and appellant's travel to San Antonio and use of false information to rent a hotel room and obtain new employment.

Additionally, we reject appellant's argument that the evidence is insufficient to support the jury's finding that the two murders were committed during the same criminal transaction. The jury heard testimony from the lead detective and from the medical examiner that, based on their investigations, the two murders were committed during the same criminal transaction. Moreover, the two victims were killed in the same manner with the same weapons and were found dead in the same location at the same time. Accordingly, the jury could have rationally concluded that the two murders were committed during the same criminal transaction. *See Jackson v. State*, 17 S.W.3d 664, 669 (Tex. Crim. App. 2000) (evidence was sufficient to support capital murder conviction where "both victims were killed in the same manner with the same weapons and were found dead in the same apartment").

Appellant's first and second issues are overruled.

II. Appellant's Custodial Statements

In his third issue, appellant contends the trial court erred by admitting certain statements appellant made to police while in custody.

A. Standard of Review and Applicable Law

An accused's oral statement made as a result of custodial interrogation is not admissible at trial unless the accused was warned of his rights and knowingly, intelligently, and voluntarily waived those rights. *See Miranda v. Arizona*, 384 U.S. 436 478-79 (1966); Tex. Code Crim. Proc. Ann. art. 38.22 § 3 (Vernon Supp. 2015). Section 5 of article 38.22 does not preclude the admission of a statement "that is the res gestae of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation . . . ." *Id.* § 5; *see also Miranda*, 384 U.S. at 478 ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence," and "[v]olunteered statements of any kind are not barred by the Fifth Amendment.").

Moreover, "the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980). "Interrogation" refers to either express questioning or to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301.

The defendant bears the initial burden of establishing that a statement was the product of custodial interrogation. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). A trial judge's ultimate "custody" determination presents a mixed question of law and fact; we afford almost total deference to a trial judge's "custody" determination when the questions of historical fact turn on credibility and demeanor, and we otherwise review the determination *de novo*. *Id.* at 526-527. When a trial judge denies a motion to suppress and does not make findings of fact,

we view the evidence in the light most favorable to the trial court's ruling and assume the trial court made implicit findings of fact that support its ruling, as long as those findings are supported by the record. *Id.* at 527.

B. Discussion

When appellant was arrested, Detective Jernigan identified himself and told appellant he was under arrest for the capital murders of Gomez Sr. and Vanegas-Martinez. Appellant responded, "Detective Jernigan, huh," as if he already knew Jernigan's name. Once at the sheriff's department, appellant asked if he was under arrest. Detective Jernigan again told appellant that he was under arrest for the capital murders of Gomez Sr. and Vanegas-Martinez, at which point appellant responded sarcastically, "I know those people. They're dead." Appellant also stated, "I didn't even know I was under investigation."

Detective Jernigan testified that appellant was in custody at the time the statements were made and that appellant had not yet received *Miranda* warnings. Detective Jernigan further testified that appellant's statements were not in response to any questions, but were instead volunteered information.

During trial, the court held a hearing outside the presence of the jury on the admissibility of the offered statements. After arguments from counsel, the trial court ruled that the statements at issue were admissible. The trial court did not provide a basis for its ruling.

Viewing the evidence in the light most favorable to the trial court's ruling, and assuming the trial court made implicit findings of fact that support its ruling, the evidence supports a finding that appellant made his statements while in custody, but that appellant's statements were not the result of custodial interrogation. According to Detective Jernigan's testimony, appellant's statements

were made voluntarily, and not in response to any express questioning by Detective Jernigan or any words or actions Detective Jernigan should have known were reasonably likely to elicit an incriminating response from appellant. *See Innis*, 446 U.S. at 301. Accordingly, appellant's custodial statements were admissible.

Appellant's third issue is overruled.

III. Admission of Extraneous Offenses

In his fourth issue, appellant contends that the trial court erred by allowing evidence of appellant's extraneous offenses.

A. Standard of Review and Applicable Law

Under Texas Rule of Evidence Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tex. R. Evid. 404(b), 60 Tex. B.J. 1129, 1134 (1998, superseded 2015).[6] Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." *Id.*

Article 38.36 of the Texas Code of Criminal Procedure provides in relevant part:

> In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and

[6] The Texas Court of Criminal Appeals adopted revisions to the Texas Rules of Evidence, except as to Rules 511 and 613, effective April 1, 2015. *See* Final Approval of Amendments to the Texas Rules of Evidence, Misc. Docket No. 15-001 (Tex. Crim. App. Mar. 12, 2015). We cite to the previous version of the Rules because appellant's trial occurred in 2014 before the effective date of the amendments.

> circumstances going to show the condition of the mind of the accused at the time of the offense.

Tex. Code Crim. Proc. Ann. art. 38.36(a) (Vernon 2005). Evidence admissible under Article 38.36 still must meet the requirements of the rules of evidence. *Smith v. State*, 5 S.W.3d 673, 679 (Tex. Crim. App. 1999).

Rule 403 provides that relevant evidence "may be excluded 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, 60 Tex. B.J. 1129, 1134 (1998, superseded 2015). Extraneous offense evidence is admissible under both Rules 403 and 404(b) if the evidence satisfies a two-pronged test: (1) whether the extraneous offense evidence is relevant to a fact of consequence in the case aside from its tendency to show action in conformity with character; and (2) whether the probative value of the evidence is not substantially outweighed by unfair prejudice. *Page v. State*, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006).

We review a trial court's admission of extraneous offense evidence for an abuse of discretion. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). As long as the trial court's ruling is within the "zone of reasonable disagreement," there is no abuse of discretion, and the trial court's ruling will be upheld. *Id.* at 344.

B. Discussion

Appellant contends that the following evidence was admitted at trial over objection, and that such admission was error:

- appellant carried a .40 caliber pistol;[7]

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[7] The evidence at trial showed that the murders were committed with a .380 caliber pistol.

- appellant carried a knife;
- appellant and Gomez Sr. ran a "hooker bar" together;
- appellant sexually assaulted prostitutes working at appellant's and Gomez Sr.'s bar; and
- appellant's former common-law wife saw "possibly some powder hanging around the bathroom" in the house she shared with appellant, suggesting the presence of illicit drugs.

Appellant contends that the testimony constituted evidence of engaging in prostitution, compelling prostitution, sexual assault, possession of a prohibited weapon, and possession of a controlled substance.

Contrary to appellant's assertion on appeal, evidence that appellant sexually assaulted prostitutes at the bar was ruled inadmissible and was not presented to the jury. Accordingly, appellant's argument on this issue is misplaced.

Regarding the evidence that appellant carried a pistol and a knife, there was no evidence that either the pistol or the knife was carried illegally by appellant. We conclude that the references to appellant carrying a pistol and a knife were not evidence of extraneous offenses. *See, e.g.*, *Dixon v. State*, 828 S.W.2d 42, 47-48 (Tex. App.—Tyler 1991, pet. ref'd) ("We conclude that the references to finding police scanners during the search were not evidence of an 'extraneous' offense. The possession or operation of police scanners is not illegal, nor is there any suggestion that such is 'wrong' or an 'act' of misconduct.").

Moreover, although appellant objected to testimony of the knife and pistol at one point, appellant himself testified that he had carried a pistol and a knife. We conclude that any error in admission of such testimony therefore was harmless. *See Moore v. State*, 165 S.W.3d 118, 126 (Tex. App.—Fort Worth 2005, no pet.) ("Appellant himself testified on direct examination to his drug use and drunk driving on the day of the assault. Therefore, there can be no doubt as to his

connection to these extraneous offenses."); *Bowser v. State*, No. 03-01-00086-CR, 2002 WL 23523, at *1 (Tex. App.—Austin Jan. 10, 2002, pet. ref'd) (not designated for publication) (where appellant admitted his involvement in extraneous misconduct, any alleged error was harmless).

Likewise, appellant admitted on cross-examination that the bar appellant and Gomez Sr. were running was a "whorehouse." Accordingly, we conclude that any error from the admission of testimony that the bar was a "hooker bar" or a "whorehouse" was harmless. *See Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *Moore*, 165 S.W.3d at 126; *Bowser*, 2002 WL 23523, at *1.

Finally, appellant's common-law wife testified that appellant's demeanor changed around the time that appellant and Gomez Sr. opened their bar, and that she saw "possibly some powder hanging around the bathroom." There was no discussion of illicit drugs. Even assuming this brief testimony could be construed as implying that appellant was in possession of a controlled substance, appellant objected to the testimony and the trial court instructed the jury to disregard it. Accordingly, any error regarding the "powder" testimony was cured. *See Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998) ("A witness's inadvertent reference to an extraneous offense is generally cured by a prompt instruction to disregard."); *Cazares v. State*, 488 S.W.2d 110, 112 (Tex. Crim. App. 1972) (testimony that appellant was a "dope peddler" was objected to, and the objections "were sustained by the court and the jury was instructed to disregard the same, hence the error, if any, was cured.").

Having concluded that the asserted evidence was either not admitted, was properly admitted, or that any error resulting from the admission was harmless or cured, we overrule appellant's fourth issue.

IV. Appellant's *Batson* Challenge

In his fifth issue, appellant contends that the trial court erred by denying his *Batson* challenge to the State's use of a peremptory strike on a Hispanic venireperson.

A. Standard of Review and Applicable Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the State from exercising its peremptory strikes based solely on the race of a potential juror. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *Nieto v. State*, 365 S.W.3d 673, 675 (Tex. Crim. App. 2012); *see* U.S. Const. amend. XIV, § 1. The use of a peremptory challenge to strike a prospective juror based on race also violates Article 35.261 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 35.261 (Vernon 2006). A single impermissible strike for a racially motivated reason invalidates the jury selection process and requires a new trial. *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *Jones v. State*, 431 S.W.3d 149, 154 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

A *Batson* challenge is evaluated under a three-step process. *Hernandez v. New York*, 500 U.S. 352, 358 (1991); *Nieto*, 365 S.W.3d at 675-76. First, the defendant must make a *prima facie* showing of racial discrimination. *Batson*, 476 U.S. at 96-97.

If the defendant makes the requisite showing, the burden shifts to the State to articulate a race-neutral explanation for the strike. *Id.* at 97; *Shuffield v. State*, 189 S.W.3d 782, 785 (Tex. Crim. App. 2006). The race-neutral explanation does not have to be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Rather, "the issue is the facial validity of the [State]'s explanation. Unless

a discriminatory intent is inherent in the [State]'s explanation, the reason offered will be deemed race neutral." *Id.* (quoting *Hernandez*, 500 U.S. at 360).

Finally, the trial court must determine if the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98; *Nieto*, 365 S.W.3d at 676. The trial court's ruling must be sustained unless it is clearly erroneous. *Nieto*, 365 S.W.3d at 676. We defer to the trial court's ruling in the absence of exceptional circumstances. *Id.*

B. Discussion

Appellant is Hispanic. Before the trial court impaneled the jury, appellant made a *Batson* challenge contending that of the two potential Hispanic jurors, the State struck one based solely on race.

Without conceding that appellant had made a *prima facie* case of discrimination, the State argued it struck the prospective Hispanic juror because the juror did not completely fill out his juror questionnaire. The State also identified two other jurors it had struck for failure to completely fill out the juror questionnaire; one was black and one was white. The trial court denied appellant's *Batson* challenge.

Assuming without deciding that appellant made a *prima facie* case of discrimination,[8] the State responded with a race-neutral explanation for the strike — that the juror had not completely filled out his juror questionnaire. As further

[8] It is unclear whether striking only one of two jurors of appellant's race, alone, creates a *prima facie* case of discrimination. *See Salazar v. State*, 818 S.W.2d 405, 407 (Tex. Crim. App. 1991) ("Appellant is a hispanic. The venire consisted of only one hispanic person, Ms. Catalina Gonzalez, and she was peremptorily struck by the State. Although striking a single juror does not, alone, make out a prima facie case of discrimination, a prima facie case *was* made when the State peremptorily struck Ms. Gonzalez as she represented 100% of the venirepersons who were of appellant's race.") (emphasis in original). By offering an explanation for its strike, however, State rendered the *prima facie* case analysis moot. *Jones*, 431 S.W.3d at 155.

support of that race-neutral explanation, the State identified two other prospective jurors of other races that the State had struck for the same reason. Because the record supports the State's race-neutral explanation, we conclude that the trial court's ruling denying appellant's *Batson* challenge was not clearly erroneous.

Appellant's fifth issue is overruled.

V. Constitutionality of Mandatory Life Sentence without Parole

In his sixth issue, appellant contends that his mandatory sentence of life without parole is unconstitutional under the Eighth Amendment to the United States Constitution and article 1, section 13 of the Texas Constitution because the automatic sentencing scheme does not allow for the consideration of mitigating evidence.

Appellant admits that no objection to the mandatory sentencing scheme was made at trial. Accordingly, appellant has waived this issue by raising it for the first time on appeal. *See Wilkerson v. State*, 347 S.W.3d 720, 722 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (rejecting identical constitutional challenge to mandatory life sentence where no trial objection was made).

Even if error had been preserved, this court has routinely held that an automatic sentence of life without parole is not unconstitutional when assessed against an adult offender convicted of capital murder. *See Sloan v. State*, 418 S.W.3d 884, 891-92 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (refusing to extend *Miller v. Alabama*, 132 S. Ct. 2455 (2012), to the adult-offender context); *Wilkerson*, 347 S.W.3d at 722-23 (holding that an automatic sentence of life without parole did not violate either the United States Constitution or the Texas Constitution). Accordingly, we overrule appellant's sixth issue.

CONCLUSION

Having overruled all of appellant's issues, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Brown.
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