COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00397-CR

MICHAEL HENDERSON	APPELLANT
V.	
THE STATE OF TEXAS	STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1263864R

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Michael Henderson[2] appeals his conviction for capital murder. In ten points, Henderson argues that the trial court abused its discretion by allowing

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[1] *See* Tex. R. App. P. 47.4.

[2] The record is replete with references that Michael Henderson is also known as Michael Gilbert.

witnesses to testify to an extraneous offense, that the trial court erred by denying his two *Batson* challenges, that the trial court erred by granting one of the State's challenges for cause, that the trial court erred by denying his motion to suppress in three respects, that the indictment was fundamentally flawed, that he was denied his right to confront a witness, and that the trial court abused its discretion by allowing testimony regarding spousal-privileged communications. We will affirm.

II. Background

Henderson's biological daughter[3] (Daughter) testified at trial that on the morning of March 22, 2011, as she was just stepping out of the shower and after her mother (Wife) had left for work, Henderson called her into his room. From there, Henderson ordered her to remove her towel and lie on the bed, where he sexually assaulted her. After ejaculating on her back, Henderson wiped her off with a towel. As she lay on the bed crying, Henderson told Daughter that the reason he had sexually assaulted her was because they had not spent enough "bonding time together." According to Daughter, Henderson ordered her to take a shower and then left the house.

Daughter said that she chose not to shower. She then dropped her little brother off at school and drove to a friend's house, where she told her friend what had happened. The friend told his mother, who called the police. Daughter said

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[3]The record indicates that Daughter was younger than the age of seventeen years old at the time of the events she testified to.

that she attempted to call Wife but was unable to get ahold of her. Daughter said that when officers arrived, she spoke with them about what had happened. The police took her to the hospital, where a sexual assault (SANE) nurse examined her.

The SANE nurse testified that after obtaining Daughter's medical history, she wrote down verbatim Daughter's account of what transpired. During the examination, the SANE nurse said that she discovered tears, swelling, and tenderness to Daughter's labia and vagina, indicating recent trauma. The SANE nurse also took DNA samples. A DNA expert testified that the fluids the SANE nurse obtained matched Henderson's DNA profile.

Daughter said that as she waited at the hospital for Wife, Henderson's sister visited her. Daughter said that this struck her as "weird" because the two were not close. Daughter averred that the sister called Henderson from the hospital and put Daughter on speaker phone. By Daughter's account, Henderson urged her to not report the assault to the police because "this is family" and you "don't talk about this."

Wife testified that on March 22, she had left her phone at home, so she did not receive Daughter's calls. She also averred that on that morning her sister (Aunt) and Henderson arrived at her work almost simultaneously. Wife said that as Aunt told her where Daughter was and why she was at the hospital, Henderson was there "to talk about the same thing." Wife averred that she and Henderson got into a "heated discussion" and that he then left.

Later that day, Wife received several text messages from Henderson asking her to "talk" to him. Wife said she initially ignored these texts but later responded that she would stand behind Daughter even though she did not know the truth of what had happened at that time.

Wife said that she and Henderson spoke on the phone over the next several days and that he told her that he had a gun and that he intended to kill himself. By Wife's account, Henderson later told her that he was going to find someone to kill him so that she could collect on his life insurance policy. He also told her that he had taken money from their joint bank accounts. The State introduced evidence that he had withdrawn more than $26,000 after Daughter reported the assault.

According to the testimony of Krista Grizzle, Henderson's paramour, Henderson arrived at her apartment late in March 2011 and said that he needed to leave town. Grizzle averred that Henderson told her that he had been in an altercation with a relative and that the relative had pulled a gun on him. He also told her that he was involved in a drug deal with the Mexican Mafia that had "gone bad" or that he owed them money and needed to escape their reach. Grizzle said that she was evicted from her apartment several days later and that the two moved in with Henderson's friends, Tim Penn and Brenna Leath, at the Westchase Apartments on the west side of Fort Worth.

By Grizzle's account, on the afternoon of March 29, Henderson called her and told her to borrow some money from Penn and Leath, then take his Buick to

a gas station and purchase the largest gas can available, and then to go to a different gas station and fill the can with gas—he also told her to fill up the car.

After giving her directions, Henderson told Grizzle to bring the full gas can to a rental property that Wife owned in Everman. After arriving at the rental property, Henderson told Grizzle to back the vehicle out of the driveway so that he could move his Dodge pickup out of the garage—she then pulled the Buick into the garage. When she stepped out of the Buick, she saw a body wrapped in a striped sheet, covered in a pool of blood, and propped up against the wall of the garage. Grizzle said that this caused her to begin "freaking out," which in turned caused Henderson to step into the garage, pull down the garage door, and yell at her to "stop panicking and [] get into the f'ing house." Grizzle went inside the empty home, and Henderson placed the body into the trunk of the Buick. Later, Grizzle said that she peeked into the garage and saw that Henderson had unwrapped the body and was cleaning the walls and floor, using a rag to soak up the blood and wringing it out in the sink.

Grizzle said that as Henderson used chemicals and water to clean the walls and floors, she began to gag. This caused Henderson to become angry and to again yell at her to calm down. According to Grizzle, she wanted to flee, but she believed that Henderson would be able to catch her and feared that she would "end up just like the person in the garage." Grizzle said that other than placing some bags in a pillowcase at Henderson's command, she did not assist him in cleaning the garage.

By late afternoon, with blood spattered over his clothes and having placed his belt and phone case in the trunk with the body, the two left the house and drove his Dodge pickup to a thrift store in order to buy something else for Henderson to wear. Grizzle accompanied him inside, where Henderson purchased some clothes and a wallet for himself and some clothes for her. Henderson also filled out an application for a reward card in the name of "Gary Ali," whose birth certificate, Social Security card, and identification card he possessed, and Henderson used the address of the Westchase Apartments, where the couple was now staying. The transaction was caught on the store's security camera, and a video of it was played for the jury.

After their visit to the thrift store, the couple drove back to the Westchase Apartments. Grizzle averred that sometime that afternoon, Henderson told her that he had shot the victim six times and that the man, later identified as Ali, had "begged for his life." He also told her that he intended to change his name and flee to Canada, but he complained that in order to do so, he needed to obtain a "long" form birth certificate.

In the early hours of the next morning, the couple returned to the rental property. From there, Henderson told Grizzle to follow him in the Buick, but she refused. So instead, she followed him in the Dodge pickup to a park on the shore of Lake Arlington, where Henderson drove the Buick off a dead-end road, through a road-side cable, and onto a grassy area surrounded by trees. Grizzle averred that she could still see the vehicle's taillights from where she had

stopped the pickup and waited. About fifteen minutes later, Grizzle said that she heard and saw that he had set the Buick on fire. Grizzle said that Henderson then came running back, carrying the gas can. He then threw the can in the bed of the truck, jumped in the cab, and yelled at her: "Go. Go. Go." Grizzle recalled that as the two drove away, Henderson declared, "God dammit. I left the [f***ing] lid to the gas can." By Grizzle's account, she could see smoke and flames from the burning car as she drove away and then heard sirens. After stopping and switching seats, the couple returned to the Westchase apartment.

Tom Gierling, a police officer for the City of Fort Worth, testified that he responded to a call regarding the burning vehicle. As the Buick burned, Gierling wrote down the license plate number and continued to search for anything unusual. As he searched, he noticed a few items on the ground, including a tennis shoe and a wallet. Gierling said that the wallet was arranged strangely in that it was open and the identification was flipped up, exposing the identification. Gierling said it was as if it were being "displayed" for someone to notice. Fearing that it might be destroyed by encroaching flames, Gierling picked up the wallet, and another officer discovered that it contained Henderson's driver license, a Best Buy credit card, a Fort Worth library card, and a Six Flags card, each in one of the names Henderson was known to use—as well as Blockbuster and Kroger cards. Later that morning, while still on scene, the officers learned that the Buick was registered to Henderson. They also learned he was a suspect in a sexual

assault case. After the fire was extinguished, Gierling and other officers inspected the automobile and discovered the body inside the trunk.

Christopher Bain, a police officer for the City of Fort Worth who also responded to the scene, testified that as investigators surveyed the scene, officers found several items linked to Henderson sprinkled around the vehicle, including a credit card in Wife's name, a partially burned flyer for Henderson's lawn care business, an Office Max card in the name of Michael Gilbert, his Social Security card, his worker's comp card, and an insurance card listing his family members. By Bain's account, he and the other officers suspected that these identifying items had been staged in that they were "too conveniently placed." Bain said that he also discovered the gas can nozzle.

Later, the medical examiner determined that Ali's body had been burned so badly that his leg bones had been burned through, large parts of his skull were gone, and his fingers were so fragmented that identification through fingerprinting was impossible. The medical examiner was nonetheless able to conclude that Ali had been killed by a gunshot to the head from a large caliber bullet. He also recovered two bullet fragments from the body.

Over the next several days, using Henderson's dental records, investigators were able to rule out Henderson as the victim. Later DNA analysis established that the body was that of Ali, a homeless man who had disappeared on March 29 from the Presbyterian Night Shelter. Ali had been known to work as a day laborer doing lawn care.

Investigators learned that after the fire, Henderson bought paper temporary license tags for his Dodge pickup, swapping them for the permanent metal plates. They also learned that he attempted to get a long birth certificate but was unable to obtain one. Moreover, Henderson was at first unsuccessful in his attempts to buy a cellphone in Ali's name but later he was able to purchase an iPhone in Ali's name. Henderson's purchase of the iPhone was captured on video.

Later in the evening, Henderson showed Grizzle a handgun. Grizzle said that as he showed it to her, he twirled it around his finger and said that he had used it to shoot Ali six times. Later, the couple drove toward Lake Worth and stopped on a bridge in White Settlement, where Henderson threw the handgun into the lake. As they drove back to the apartment, Henderson had Grizzle cut up Ali's credit cards and toss empty cartridge shells and the pieces of Ali's credit cards along the highway.

Grizzle said that Henderson told her that she was now his accomplice and that he told her to call the police and leave multiple false tips. A detective testified that an anonymous tip that was received from a female said that a guy named "Shorty" had "jacked a black male, put him in the trunk of the car, and burnt the car at Lake Arlington." As she made one of two calls, Grizzle provided an address and birthday for "Shorty," who she also identified as Jesus Gonzales. Investigators determined that both tips had been made by Grizzle and that both were false.

Having concluded that Henderson was not the individual found in the Buick, and having obtained a warrant for his arrest for the sexual assault of Daughter, investigators began looking for him. By April 5, investigators had interviewed Wife, checked the rental property in Everman, and talked to Henderson's known associates. As part of their investigation, Detectives Thomas O'Brien and Matthew Barron went to the Westchase Apartments to meet and talk with Penn and Leath.

As the detectives drove through the apartment complex's parking lot, they saw a truck that matched the description of Henderson's Dodge pickup truck. The truck had paper license tags, but the Detectives were able to run the truck's VIN number and confirm that it was in fact Henderson's truck. From there, O'Brien called the department's Fugitive Unit and assigned several officers to watch the truck.

After locating Penn and Leath's apartment, the detectives knocked on the door, and a male voice asked, "Who is it?" After the detectives identified themselves and asked to speak with Penn and Leach, a male, whom the detectives determined was obviously attempting to disguise his voice to sound like a child, said that he was not allowed to open the door because his "mommy" was not home. As the detectives walked away, a maintenance man pointed out that a woman playing with a dog nearby had been in the apartment and had walked out just prior to the detectives' arrival. Not knowing that the woman was Grizzle when initially talking to her, Grizzle confirmed that there was not a boy in

the apartment, but she maintained that only Penn and Leath were there. Grizzle agreed to enter the apartment and convince Penn and Leath to open the door and talk to the detectives. Eventually, Penn permitted the detectives to enter, but his odd behavior led them to suspect that Henderson was in the back of the apartment. Wishing to avoid a possible armed confrontation, the detectives asked the couple to come to police headquarters with them to answer some questions—the four left in the detectives' vehicle.

Grizzle, who left the apartment when the detectives did, heard Henderson call her name from the balcony of the apartment. Grizzle said that he then tossed her the apartment keys, explained that he was locked out, and instructed her to enter the apartment and unlock the balcony door. Once both were inside, Henderson ordered her to help him load up "his stuff" and cautioned her to "not leave any evidence behind." Grabbing what she could, she followed Henderson out to his truck. Grizzle said that she made several trips and that on her last trip, she noticed that some of Henderson's things were scattered on the ground near the truck. No longer aware of Henderson's whereabouts, Grizzle returned to the apartment.

While Henderson was placing some things in the back of his truck, the Fugitive Unit officers approached Henderson. He fled. And they pursued. After a fruitless search of another apartment they believed he had ducked into, they returned to the original apartment.

Within this timeframe, according to Grizzle, Henderson entered the apartment, locked the door behind him, and yelled: "They saw me. They saw me." He fled to a bathroom in the back, where he took off the cover of an air vent in the ceiling. By Grizzle's account, he then ran to the kitchen and began to make a hole in the sheetrock wall.

As the Fugitive Unit officers returned to the apartment, the officers began yelling, "Come out! Surrender and come out with your hands up." Grizzle exited the apartment and told them that Henderson was inside, armed, and attempting to escape by tunneling through the wall. The officers cordoned off the area and notified the SWAT team and the detectives—O'Brien and Barron—who were just arriving at police headquarters with Penn and Leath.

At the same time, SWAT began to fire teargas into the apartment, but when Henderson did not exit, they went in after him. Finding a hole in the ceiling, they became concerned that the building was so old that it might not have firewalls that extended up under the eaves, so they feared Henderson might have been able to crawl away through the walls. Thus, they fired more teargas into the attic. Henderson still did not surrender, however, until several SWAT officers followed him up through the ceiling and cornered him in the crawl space. He was armed with a knife. He was also carrying Ali's driver license, Social Security card, and library card in a new brown wallet.

Based on what investigators had discovered, O'Brien obtained an arrest warrant for Henderson for capital murder, two search warrants for the Westchase

apartment, a search warrant for the residence in Everman, and a search warrant for Henderson's Dodge pickup truck. Grizzle also led investigators to several places where she had accompanied Henderson after the murder, including the park where they had left the burning Buick, the thrift store, the stretch of road where they had thrown the shell casings and credit-card pieces, and the bridge where Henderson had tossed the handgun into the lake. From this, investigators found a single casing on the side of the highway but were unable to retrieve the handgun from the lake.

After allowing the teargas to subside, investigators searched the apartment. Among other items, they found a small safe, which they forced open and found $38,025 in cash inside. They also seized a yellow bag. Inside the bag, they discovered a T-shirt that resembled the one Henderson can be seen wearing in the video footage from the thrift store. DNA testing on the shirt revealed blood stains matching Ali's DNA. Investigators later returned to the apartment with a separate warrant to retrieve, among other things, a plastic bag containing a debit card and various other documents bearing Ali's name, the Safety Network card Ali had been given from the Presbyterian Night Shelter, and a Sony Walkman that Ali was known to always have with him.

Investigators also searched the residence in Everman twice. During the first search, investigators took photographs of the interior of the home, and later examination of the photographs revealed a bullet hole in the dining room wall and a spent bullet on the floor of the garage. During the second search, using a

chemical similar to Luminol, they found a bloodstain trail leading from the kitchen, down the side of the garage, to just in front of the garage door. They also discovered a bloody palm print and a bloody shoe print inside the house, as well as traces of blood on the garage door itself. The condition of some of the stains indicated that someone had tried to clean up the blood.

Searching Henderson's truck, investigators found a copy of Ali's birth certificate folded into the console between the driver and passenger seats. Also in the cab, underneath a magazine, they found the metal license tags to the truck and a pair of receipts from a cellphone store, reflecting the sale of an iPhone and accessories in Ali's name. Investigators additionally found a lockbox, disguised as a dictionary, packed with other things in the bed of the truck. After forcing it open, they discovered Ali's voter registration card and a small pouch holding several $2 bills, a lighter, and a coin.

Investigators also seized two computers from the truck. A search of one of the computers, conducted with a warrant, revealed that it had a password-protected account entitled "Mr. G" that had been used to create a Yahoo! account named garyali96@yahoo.com. This account's Internet search history revealed that the laptop had been used to search local news sites for stories about a body found in the trunk of a burning car and about a body on fire at Lake Arlington. The account had also been used to run a series of searches regarding how to obtain a passport, the death of Michael Gilbert (one of Henderson's known names), and a search for information about Ali.

After hearing all the evidence, a jury found Henderson guilty of capital murder. In accordance with the statutes governing capital murder, the trial court sentenced Henderson to life imprisonment and rendered judgment accordingly. This appeal followed.

III. Discussion

A. Evidence of Sexual Assault

In his first point, Henderson argues that the trial court erred by allowing the State to introduce extraneous offense evidence regarding the sexual assault of Daughter. At trial, Daughter, Wife, the SANE nurse who examined Daughter, and a DNA expert all testified to the extraneous offense. Henderson argues that this evidence was not relevant and that its prejudicial value outweighed its probative value. *See* Tex. R. Evid. 401, 402, 403 and 404. Inherent in Henderson's argument is the tenor that the State was allowed to put on an overly extensive amount of evidence regarding this extraneous offense.[4] The State argues that the evidence was relevant to establish Henderson's motive for committing what otherwise would have been an inexplicable murder of a total stranger.

We review a trial court's decision to admit evidence under an abuse-of-discretion standard. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op.

[4]We note that the State offered Henderson the option of stipulating to the sexual assault at trial but that he declined.

on reh'g). Under this standard, a trial court enjoys "wide latitude to exclude, or, particularly in view of the presumption of admissibility of relevant evidence, *not* to exclude" evidence. *Montgomery*, 810 S.W.2d at 390. A trial court abuses its discretion in admitting evidence only if its ruling is so clearly wrong that it lies outside the zone of reasonable disagreement. *Id.* at 391; *see also Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). In other words, an appellate court must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *See Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005).

Rule of evidence 403 states that a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. A trial court, when undertaking a rule 403 analysis, 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 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 presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). Rule 403 favors the admission of

relevant evidence and carries a presumption that relevant evidence is more probative than prejudicial. *Martinez v. State*, 327 S.W.3d 727, 737 (Tex. Crim. App. 2010), *cert. denied*, 563 U.S. 1037 (2011).

Under rule 404(b), evidence of a wrong "or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *See* Tex. R. Evid. 404(b)(1). But such evidence may be admissible for other purposes, including for purposes of showing motive or the context in which the charged crime was committed. *Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991), *cert. denied*, 509 U.S. 922 (1993); *Barefoot v. State*, 596 S.W.2d 875, 887 (Tex. Crim. App. 1980), *cert. denied*, 453 U.S. 913 (1981). Like rule 403, rule 404(b) promotes the inclusion of evidence—the rule excludes only "evidence that is offered (or will be used) solely for the purpose of proving bad character and hence conduct in conformity with that bad character." *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). A trial court does not abuse its discretion by admitting extraneous offense evidence for the limited purpose of proving motive or in order to contextualize what would otherwise appear to be a senseless murder. *Gosch*, 829 S.W.2d at 783; *Barefoot*, 596 S.W.2d at 887.

In *Barefoot*, a capital murder case, the trial court allowed extraneous offense evidence regarding sexual penetration of a minor and kidnapping, as well as evidence of Barefoot's escape from jail after being charged with these offenses. 596 S.W.2d at 886. The trial court allowed extensive testimony from

the arresting officer and from the magistrate who arraigned Barefoot for these charges, as well as from his own defense counsel. The trial court also allowed testimony from a sheriff, a deputy sheriff, and a jailor regarding Barefoot's escape from jail. *Id.* Further, these witnesses identified, and the trial court admitted in evidence, certified copies of the complaint, indictment, and arraignment in the sexual penetration and kidnapping case, as well as an indictment and arrest warrant charging appellant with escape. *Id.* In its charge to the jury, the trial court limited the jurors' consideration of these extraneous offenses to the question of Barefoot's motive for killing the decedent. Barefoot argued that it was unnecessary to admit evidence of these offenses because there was other evidence of motive aside from them. *Id.* at 887. The court reasoned that although Barefoot may have had other motives for killing the decedent, that did not mean that he was not motivated by a desire to avoid prosecution for the charges of sexual penetration of a minor, kidnapping, and escape. *Id.* The court held that the trial court did not abuse its discretion by admitting the volume of this extraneous offense evidence for the limited purpose of showing motive. *Id.*

Similarly, in *Gosch*, Gosch desired to avoid being incarcerated in a federal prison for firearms violations. 829 S.W.2d at 781–82. Thus, Gosch and his accomplice concocted a scheme to extort a large amount of cash from a bank president to finance Gosch's flight to Belize by kidnapping and ransoming the bank president's wife. *Id.* During his attempt to abduct the wife, Gosch killed

her. *Id.* at 778. At the later capital murder trial, the trial court allowed extraneous offense evidence of Gosch's federal firearms violations via testimony from Gosch's accomplice, as well as the testimony of two other witness with whom Gosch had discussed his federal firearms violations. *Id.* at 782. The court reasoned that Gosch's desire to avoid being incarcerated for the federal firearms violations was the triggering factor in the ultimate murder of the banker's wife, and thus evidence of the extraneous offense was proper to show Gosch's motive for the murder. *Id.* at 783. The court further reasoned that without this evidence, the wife's death would be "an inexplicable, seemingly senseless murder by a stranger." *Id.* The court held that the trial court did not abuse its discretion by allowing the jury to hear the extraneous offense evidence. *Id.*

Under the guidance of *Barefoot* and *Gosch*, we conclude that the trial court did not abuse its discretion in this present case. Like in *Barefoot* and in *Gosch*, here, the trial court allowed extensive testimony of the extraneous offense regarding Henderson's sexual assault of Daughter. Like in *Barefoot*, where the State's need to prove that Barefoot's motive for killing the victim was driven by a desire to avoid charges for sexual penetration of a minor, kidnapping, and escape, here, the State needed the complained-of evidence to establish that Henderson desired to avoid incarceration for the sexual assault charge. But unlike in *Barefoot*, where Barefoot had already been arrested, indicted, arraigned, and obtained counsel, here, only an arrest warrant had been issued for Henderson. Indeed, the record indicates that investigators did not obtain an

arrest warrant for Henderson until after discovering Ali's body in Henderson's burnt Buick. Thus, the State needed to provide an even more concrete level of evidence of Henderson's motive to flee prosecution than that found in *Barefoot*. Likewise, as in *Gosch*, where the State needed to prove what was both the triggering factor for Gosch's crime and what otherwise would have been an inexplicable, seemingly senseless murder by a stranger, here, the State needed to prove that what motivated Henderson to kill Ali, stage his own death, and flee the country was the power of the evidence that supported that he was guilty of the sexual assault of Daughter. Otherwise, Ali's death would have been what it appeared to the jury, an inexplicable, seemingly senseless murder.

The trial court could have reasonably concluded that the testimony of Daughter, Wife, the SANE nurse, and the DNA expert was all necessary to the State's case and that it did not have a tendency to suggest a decision on an improper basis or that it would have confused or distracted the jury from the main issue—Henderson's murder of Ali. Like in *Barefoot*, the trial court gave a limiting instruction regarding this extraneous evidence, thus it was unlikely to be given undue weight by the jury. Furthermore, the record demonstrates that the testimony about the sexual assault consists of less than one hundred pages of a ten-volume, almost-two-thousand-paged reporter's record. We hold that the trial court did not abuse its discretion by determining that the extraneous offense evidence of the sexual assault's probative value substantially outweighed any

danger of unfair prejudice or that it would have confused or misled the jury. *Gosch*, 829 S.W.2d at 783; *Barefoot*, 596 S.W.2d at 887.

Because we hold that the trial court did not abuse its discretion by concluding that the evidence concerning the sexual assault was admissible under rules 403 and 404(b) of the rules of evidence, we need not address whether the evidence was admissible under rules 401 and 402. *See* Tex. R. App. P. 47.1 (requiring appellate court to address "every issue raised and necessary to final disposition of the appeal"); *see also Smith v. State*, 316 S.W.3d 688, 699–700 n.2 (Tex. App.—Fort Worth 2010, pet. ref'd) (declining to address 401 and 402 after determining trial court properly admitted evidence under 403 and 404(b)). We overrule Henderson's first point.

B. Henderson's *Batson* Challenge

In his second and third points, Henderson argues that the trial court erred by overruling his *Batson* challenge regarding the State's use of peremptory strikes on veniremembers 11 and 28, who are African–American. Henderson asserts that the State's proffered race-neutral reasons for striking veniremembers 11 and 28 were a pretext for racial discrimination. Henderson is African–American.

1. Law on *Batson* Challenges

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits race-based jury selection. U.S. Const. amend. XIV; *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986); *Jasper v.*

State, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001); *see* Tex. Code Crim. Proc. Ann. art. 35.261(a) (West 2006). In the face of perceived purposeful discrimination, the defendant may request a *Batson* hearing to address the challenge. *See* Tex. Code Crim. Proc. Ann. art. 35.261(a).

Trial courts follow a three-step process when resolving *Batson* challenges. *Snyder v. Louisiana*, 552 U.S. 472, 476, 128 S. Ct. 1203, 1207 (2008); *Young v. State*, 283 S.W.3d 854, 866 (Tex. Crim. App.), *cert. denied*, 588 U.S. 1093 (2009). First, the defense must make a prima facie case of racial discrimination. *Snyder*, 552 U.S. at 476, 128 S. Ct. at 1207; *Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Crim. App.), *cert. denied*, 555 U.S. 846 (2008). Second, if the prima facie showing has been made, the burden of production shifts to the State to articulate a race-neutral reason for its strike. *Snyder*, 552 U.S. at 476–77, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 447. Third, if the State tenders a race-neutral explanation, the trial court must then decide whether the defendant has proved purposeful racial discrimination. *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 447.

The step-two explanation need only be race neutral on its face. *Purkett v. Elem*, 514 U.S. 765, 767–68, 115 S. Ct. 1769, 1771 (1995); *Watkins*, 245 S.W.3d at 447. The ultimate plausibility of that race-neutral explanation is to be considered as part of the third step of the analysis, in which the trial court determines whether the defendant has satisfied his burden of persuasion to prove that the strike was indeed the product of the State's purposeful

discrimination. *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771; *Watkins*, 245 S.W.3d at 447. Throughout the challenge, the burden of persuasion remains with the defendant. *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771; *Ford v. State*, 1 S.W.3d 691, 693 (Tex. Crim. App. 1999). The defendant must prove by a preponderance of the evidence that the allegations of purposeful discrimination were true in fact and that the prosecutor's reasons were merely a sham or pretext. *Watkins*, 245 S.W.3d at 451–52.

2. Standard of Review

On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 448. Appellate courts must give great deference to credibility and demeanor determinations made by the trial court in connection with a *Batson* inquiry. *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1208. The court of criminal appeals has explained our review of a *Batson* ruling as follows,

> In assaying the record for clear error, *vel non*, the reviewing court should consider the entire record of voir dire; it need not limit itself to arguments or considerations that the parties specifically called to the trial court's attention so long as those arguments or considerations are manifestly grounded in the appellate record. But a reviewing court should examine a trial court's conclusion that a facially race-neutral explanation for a peremptory challenge is genuine, rather than a pretext, with great deference, reversing only when that conclusion is, in view of the record as a whole, clearly erroneous.

Watkins, 245 S.W.3d at 448 (citations omitted).

When determining whether a race-neutral explanation was a pretext for purposeful discrimination, we examine whether comparative evidence demonstrates disparate treatment of minority veniremembers. *See Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005). If a prosecutor's race-neutral reason for striking a minority veniremember applies equally to an otherwise similar non-minority veniremember whom the prosecutor does not challenge, this may be evidence that the race-neutral reason is a pretext for purposeful discrimination. *See id.*

We cannot, however, automatically impute disparate treatment in every case in which a reason for striking a minority veniremember also technically applies to a non-minority veniremember whom the prosecutor found acceptable. *See Cantu v. State*, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 926 (1993). The decision to strike a particular potential juror is not susceptible to rigid qualification. *Id.* We must also look to the entire record to determine if, despite a similarity, there are any significant differences between the characteristics and responses of the veniremembers that would, under the facts of the case, justify the prosecutor treating them differently as potential members of the jury. *See Miller-El*, 545 U.S. at 247, 125 S. Ct. at 2329.

In *Miller-El*, the Supreme Court "considered the combined impact of a number of factors in concluding that, by clear and convincing evidence, the prosecutors exercised two peremptory challenges on a racially discriminatory basis, notwithstanding the race-neutral explanations they offered at the *Batson*

hearing." *Watkins*, 245 S.W.3d at 448 (*citing Miller-El*, 545 U.S. at 266, 125 S. Ct. at 2317). Those factors included (1) that the State had struck a higher percentage of African–Americans than non-African–Americans, (2) that the State's reasons for striking African–American jurors appeared to apply equally to non-African–American jurors whom the State did not strike, (3) that the State had used jury shuffles in a manner that supported an inference of racial discrimination, (4) that the State had questioned African–American and non-African–American jurors differently and in a way designed to obtain answers justifying strikes of African–American jurors, and (5) that the county in which the defendant was prosecuted had a formal policy of excluding minority jurors from service. *Miller-El*, 545 U.S. at 240–64, 125 S. Ct. at 2325–39; see *Watkins*, 245 S.W.3d at 448–49.

3. Analysis of the Factors

a. Disproportionate Strikes

We initially note that the State used a disproportionate number of its peremptory strikes to exclude two of the three remaining African–American veniremembers from the jury. Of the thirty-two veniremembers within the strike zone, three, or 9.375%, were African–Americans. The State used two, or 20%, of its ten peremptory challenges to strike 67% of the African–Americans on the venire panel. Thus, the State used a statistically disproportionate number of strikes on African–American veniremembers. *See Watkins*, 245 S.W.3d at 451 (noting that use of 55% of peremptory strikes to exclude 88% of black

veniremembers was clearly disproportionate); *see also Jackson v. State*, No. 02-09-00023-CR, 2010 WL 1509692, at *5 (Tex. App.—Fort Worth Apr. 15, 2010, pet. ref'd) (mem. op., not designated for publication) (concluding that State's use of 30% of its peremptory challenges to strike 75% of African–Americans on the venire panel was statistically disproportionate).

The disproportionality in the use of strikes may "support the appellant's ultimate burden of persuasion that the State's proffered race-neutral explanations are a sham." *Watkins*, 245 S.W.3d at 452. But, as the United States Supreme Court in *Miller-El* noted, a comparative analysis is "[m]ore powerful" than "bare statistics," and thus we consider the State's proffered reason for striking veniremembers 11 and 28. *See Miller-El*, 545 U.S. at 241, 125 S. Ct. at 2325.

b. The State's Reasons for Striking Veniremembers 11 and 28

We next examine the State's reasons for striking veniremembers 11 and 28 to determine whether those reasons provide evidence of a discriminatory intent. *See Watkins*, 245 S.W.3d at 448–49 (*citing Miller-El*, 545 U.S. at 241–52, 125 S. Ct. at 2317). At the *Batson* hearing in this case, the prosecutor said that it struck veniremember 11 because she had been "shaking her head in a negative fashion . . . back and forth while [he] was making some statements regarding race and bias." The prosecutor further stated that when he questioned veniremember 11 about why she was shaking her head, she said "something to the effect of, everybody in here can say they are being fair and impartial, but they

are not." The prosecutor went on to say that although veniremember 11 had stated that her biases would not affect her, he believed that her body language coupled with her statement made him believe otherwise. Our review of the record indicates that veniremember 11 said, "I shook my head probably because I really didn't pay attention to the question, [prosecutor]. Everybody can't treat you fair and impartial. Although we state we can, but sometimes we don't. That's my point."

Henderson argues that the prosecutor misrepresented what veniremember 11 actually said and that veniremember 11 affirmatively established that she did not have a bias when she later answered, "I don't have a problem treating anybody fair and impartial. I used to do that all day. All day, every day in the military." In short, it appears that Henderson is challenging the credibility of the prosecutor's recollection of what was said and that the trial court should have given more weight to veniremember 11's later statement than to her initial reaction and answer. But these are the very types of credibility and weight-of-the-evidence determinations that are to be made by the trial court. *See Grant v. State*, 325 S.W.3d 655, 657 (Tex. Crim. App. 2010) ("Because the trial court's ruling requires an evaluation of the credibility and demeanor of prosecutors and venire members, and because this evaluation lies peculiarly within the trial court's province, we defer to the trial court in the absence of exceptional circumstances."). Moreover, the State's explanation for striking veniremember 11 went unchallenged during the *Batson* hearing. Once the State proffered its

race-neutral reason for striking veniremember 11, Henderson bore the burden to convince the trial court that the State's reason was not race neutral. *See Ford*, 1 S.W.3d at 693; *see also Johnson v. State*, 68 S.W.3d 644, 649 (Tex. Crim. App. 2002) ("[A] party's failure to offer any real rebuttal to a proffered race neutral explanation can be fatal to his claim."). Henderson did not cross-examine the State about the strike or offer any rebuttal or impeachment evidence tending to show that the State's reason was pretextual.

Regarding veniremember 28, the prosecutor's stated reason for striking was because the veniremember had answered on her questionnaire that her mother was incarcerated for manslaughter and her brother was incarcerated for "either aggravated assault or robbery," though the prosecutor did say that he could not remember the exact nature of the brother's offense because he had turned in his juror questionnaires the night before. The prosecutor further provided that he had "struck everyone on the panel . . . who had close family members with felony convictions." *See Leadon v. State*, 332 S.W.3d 600, 614 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("Courts have held that having family or loved ones arrested, convicted, or in prison is a race-neutral reason for striking a panel member.").

Henderson argues that the prosecutor's stated reason is a "subterfuge" and that the State's discriminatory intent is established because the prosecutor did not strike veniremember 26, who had been arrested for a felony and whose nephew was incarcerated for a felony. But as the State points out, the trial court

questioned veniremember 26 about his arrest and veniremember 26 said that the felony charges against him were reduced to a misdemeanor and that he served one year's deferred adjudication community supervision. And as the State points out, a nephew's consanguinity is further removed than the consanguinity of a mother or brother.

Our review of the record indicates that the prosecution consistently used peremptory challenges on veniremembers whose immediate family members had been convicted of offenses that resulted in incarceration. According to the record, in addition to veniremember 28, the prosecution peremptorily challenged veniremember 20, who had a brother who "served time in prison," and veniremember 37, whose father was an "ex-convict." In contrast, in addition to veniremember 26, the prosecution did not strike veniremembers 14, 21, 31, and 45—all of whom had either been charged with a misdemeanor, had felony charges dismissed, or had a relative of more than a second degree of consanguinity with a felony conviction. Moreover, like in the case of veniremember 11, the State's explanation for striking veniremember 28 went unchallenged during the *Batson* hearing, and Henderson bore the burden to convince the trial court that the State's reason was not race neutral. *See Ford*, 1 S.W.3d at 693.

We conclude that the trial court could have reasonably found that the State did not have a discriminatory intent when it struck veniremembers 11 and 28 but rather struck these veniremembers for the reasons stated by the prosecutor at

the *Batson* hearing. *See Snyder*, 552 U.S. at 477, 128 S. Ct. at 1207; *Watkins*, 245 S.W.3d at 448.

c. Other Factors

The remaining *Miller-El* factors support the trial court's ruling. The State did not utilize a jury shuffle, and there is no evidence in the record that Tarrant County has a formal policy of excluding minority jurors from service. In fact, one African–American veniremember was seated on the jury—another factor that supports the trial court's decision. *See Lee v. State*, 949 S.W.2d 848, 851 (Tex. App.—Austin 1997, pet. ref'd) ("[W]e note the State did not strike the other African[–]American juror in the strike zone. This bolsters the prosecutor's statement that he did not strike [a veniremember] because of race."). Moreover, Henderson does not make an argument that African–American veniremembers were singled out for particular questioning during general voir dire in an attempt to create an excuse to strike veniremembers 11 and 28. And our review of the record reveals that the prosecutor did not single out African–American veniremembers for particular questioning nor fail to question African–American veniremembers.

d. Trial Court Not Clearly Erroneous

Reviewing the record as a whole and applying, as we must, great deference to the trial court's ruling, we cannot say that the trial court was clearly erroneous in overruling Henderson's *Batson* challenge. *See Watkins*, 245 S.W.3d at 448. Although the statistical analysis demonstrates that the State

used a disproportionate number of peremptory strikes on African–Americans, our comparative analysis of veniremembers 11 and 28 demonstrates that the State's reasons for striking were not pretextual. *See Watkins*, 245 S.W.3d at 448, 453–54. Accordingly, we overrule Henderson's second and third points.

C. The State's Challenge for Cause to Veniremember 7

In his fourth point, Henderson argues that the trial court abused its discretion by granting the State's challenge for cause to veniremember 7. We disagree.

The code of criminal procedure allows parties to challenge a juror for cause when the challenging side can show that the juror is incapable or unfit to serve on the jury. Tex. Code Crim. Proc. Ann. art. 35.16 (West 2006); *Lydia v. State*, 117 S.W.3d 902, 905 (Tex. App.—Fort Worth 2003, pet. ref'd). There are many specific challenges, but the rule also allows a juror to be challenged for cause if either side can show that "the juror has a bias or prejudice in favor of or against the defendant." Tex. Code Crim. Proc. Ann. art. 35.16(a)(9).

The court of criminal appeals has held that a member of the venire may be properly challenged for cause and removed "if he cannot impartially judge the credibility of witnesses." *Ladd v. State*, 3 S.W.3d 547, 560 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000). Potential jurors "must be open-minded and persuadable, with no *extreme* or *absolute* positions regarding the credibility of any witness." *Id.* While a defendant does not have a right to have a particular juror sit on his jury, he does have the right "*not* [to] have a particular

venire member on the jury *if* the venire member is challengeable for cause or the defendant exercises one of his peremptory challenges." *Johnson v. State*, 43 S.W.3d 1, 6–7 (Tex. Crim. App. 2001).

We review a trial court's ruling on a challenge for cause with considerable deference because the trial court is in the best position to evaluate a veniremember's demeanor and responses. *Newbury v. State*, 135 S.W.3d 22, 32 (Tex. Crim. App.), *cert. denied*, 543 U.S. 990 (2004); *Colburn v. State*, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998); *Guzman*, 955 S.W.2d at 89 (holding that appellate courts afford "almost total deference" to a trial court's resolution of factual and legal issues that turn on an evaluation of credibility and demeanor). We reverse a trial court's ruling on a challenge for cause "only if a clear abuse of discretion is evident." *Newbury*, 135 S.W.3d at 32 (*citing Colburn*, 966 S.W.2d at 517); *Moore v. State*, 54 S.W.3d 529, 535–36 (Tex. App.—Fort Worth 2001, pet. ref'd).

To show error in the trial court's grant of the State's challenges for cause, an appellant must show either that the trial court applied the wrong legal standard in sustaining the challenge or that the trial court abused its discretion in applying the correct legal standard. *Moore*, 54 S.W.3d at 535. Further, in cases in which the veniremember is vacillating, almost total deference is given to the trial court's decision. *See Clark v. State*, 929 S.W.2d 5, 9 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Brown v. State*, 913 S.W.2d 577, 580–81 (Tex. Crim. App. 1996).

Here, veniremember 7 disclosed that he believed that local law enforcement "seem[s] to be very arrogant, aggressive, and many times disrespectful, especially to minorities." And although veniremember 7 stated that he believed himself to be "an objective person" and that he "would listen to the evidence," he agreed that he found police officers to be a little less credible than other people. And again later, when asked about his observations and experiences with police officers, he said that he would "have a tendency to distrust them." He also responded, "Yes, sir," to the prosecutor's final question of whether this was a firmly held belief.

We conclude that veniremember 7's disclosures are sufficient to support the trial court's grant of the State's challenge for cause. His slight vacillation that he could be objective compared to his consistent stance that he firmly distrusted police officers is more than sufficient for us to conclude that there was no clear abuse of discretion on the trial court's part by granting this challenge. *See Tucker v. State*, 183 S.W.3d 501, 511–12 (Tex. App.—Fort Worth 2005, no pet.) (holding that trial court did not abuse its discretion by granting State's challenge for cause to veniremember who said she would be more critical towards law enforcement because of her experiences, even though veniremember stated she would follow the law and not be biased). We overrule Henderson's fourth point.

D. Henderson's Motion to Suppress

In his fifth, sixth, and seventh points, Henderson argues that the trial court erred by denying his motion to suppress certain items of evidence.

1. Standard of Review

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *Guzman*, 955 S.W.2d at 89 (Tex. Crim. App. 1997). In reviewing the trial court's decision, we do not engage in our own factual review. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Best v. State*, 118 S.W.3d 857, 861 (Tex. App.—Fort Worth 2003, no pet.). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000), *modified on other grounds by State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006). Therefore, we give almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador*, 221 S.W.3d at 673; *Montanez v. State*, 195 S.W.3d 101, 108–09 (Tex. Crim. App. 2006); *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002). But when application-of-law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court's rulings on those questions de novo. *Amador*, 221 S.W.3d at 673; *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); *Johnson*, 68 S.W.3d at 652–53.

Stated another way, when reviewing the trial court's ruling on a motion to suppress, we must view the evidence in the light most favorable to the trial court's ruling. *Wiede*, 214 S.W.3d at 24; *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). When the trial court makes explicit fact findings, we determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports those fact findings. *Kelly*, 204 S.W.3d at 818–19. We then review the trial court's legal ruling de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* at 818.

When the record is silent on the reasons for the trial court's ruling, or when there are no explicit fact findings and neither party timely requested findings and conclusions from the trial court, we imply the necessary fact findings that would support the trial court's ruling if the evidence, viewed in the light most favorable to the trial court's ruling, supports those findings. *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008); *see Wiede*, 214 S.W.3d at 25. We then review the trial court's legal ruling de novo unless the implied fact findings supported by the record are also dispositive of the legal ruling. *Kelly*, 204 S.W.3d at 819.

We must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case, even if the trial court gave the wrong reason for its ruling. *State v. Stevens*, 235 S.W.3d 736, 740 (Tex.

Crim. App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003), *cert. denied*, 541 U.S. 974 (2004).

2. The Search of Henderson's Truck

In his sixth point, Henderson argues that the trial court erred by not suppressing evidence found in his truck. Specifically, Henderson argues that officers in this case did not have legal authority to tow his truck away from the apartment complex and then later retrieve a warrant and search it. We conclude that the officers in this case were not required to get a warrant because under the automobile exception, they had probable cause to seize and search Henderson's truck.

One exception to the warrant requirement is the automobile exception, under which law enforcement officials may conduct a warrantless seizure and search of a vehicle if it is readily mobile and there is probable cause to believe it contains evidence of a crime. *See Keehn v. State*, 279 S.W.3d 330, 335 (Tex. Crim. App. 2009). No exigent circumstances are required under this exception. *See Neal v. State*, 256 S.W.3d 264, 283 (Tex. Crim. App. 2008), *cert. denied*, 555 U.S. 1154 (2009); *State v. Guzman*, 959 S.W.2d 631, 634 (Tex. Crim. App. 1998). The automobile exception applies regardless of whether officers search a vehicle at the location where it is found or they remove the vehicle to another location. *See Miller v. State*, 815 S.W.2d 805, 809–10 (Tex. App.—Austin 1991, pet. ref'd) (holding that when officers have probable cause to search a vehicle, they are allowed to remove vehicle to another location to conduct search);

Rodriguez v. State, No. 13-12-00233-CR, 2014 WL 1514061, at *4 (Tex. App.—Corpus Christi Apr. 17, 2014, no pet.) (mem. op., not designated for publication) ("[T]he fact that Rodriguez's vehicle was towed to the Brownsville Police Department does not detract from the officers' ability to search the vehicle."). Probable cause exists when reasonably trustworthy facts and circumstances within the knowledge of the officer would lead persons of reasonable prudence to believe that an instrumentality of a crime or evidence pertaining to a crime will be found. *See Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007).

Viewing the evidence in a light most favorable to the trial court's ruling, the evidence from the suppression hearing shows that at the time O'Brien ordered the truck to be towed, there was an outstanding warrant for Henderson's arrest for the offense of aggravated sexual assault of a child; another vehicle registered to Henderson had been found burning in a park by Lake Arlington a few days prior; a dead body was found inside that vehicle; identification and credit cards in Henderson's name were found near that vehicle; Henderson had changed the license tags on his truck; the truck was discovered parked in the parking lot of an apartment complex where known acquaintances of Henderson lived; the officers keeping watch over Henderson's truck witnessed him and Grizzle load items into the truck; when these officers approached Henderson, he fled on foot into the complex, where officers lost sight of him; Henderson then barricaded himself into an apartment and Grizzle informed officers that he was attempting to tunnel through the walls to escape; and O'Brien testified multiple times that he was

concerned that evidence related to both the sexual assault and the murder may have been on or in the truck.

We hold that O'Brien possessed reasonably trustworthy facts and circumstances within his knowledge that would have led him to believe that evidence pertaining to either the sexual assault or the murder would be found on or in Henderson's truck. *Gutierrez*, 221 S.W.3d at 685. Thus, we conclude that the trial court could have properly concluded that O'Brien lawfully seized the truck under the automobile exception. *See State v. Cantu*, 776 S.W.2d 728, 730–32 (Tex. App.—Corpus Christi 1989, pet. ref'd) (discussing Supreme Court cases involving the search of an automobile after it had been seized and taken to a police station under automobile exception). Although we applaud the officers in this case for taking the extra-prudent step of obtaining a warrant, it was not constitutionally required under these facts. We overrule Henderson's sixth point.

3. Unauthorized Access to Two Computers

In his fifth point, Henderson argues that the trial court erred by not suppressing evidence located on the computers that police found in his truck and later obtained a warrant to search. We disagree.

While searching Henderson's truck, police found two laptop computers. After obtaining warrants, the officers searched those computers and found evidence that someone with access to the password-protected account of "Mr. G" searched the Internet for information about obtaining a passport, for local news reports about the death of the victim, and for local news reports about his own

death. The search also revealed that someone on one of the computers had created a Yahoo! email account in the victim's name.

Four years after the search, law enforcement informed the prosecutor, who then informed defense counsel, that they had learned through forensic examination that someone at the police station had turned one of the two computers on, had logged into an account that did not require a password on the other computer, and that these events occurred prior to the police having obtained warrants to search the computers.

At the suppression hearing, the State's expert testified that although these events had occurred, it was obvious that whoever turned on or logged into the computers never accessed the password-protected account that later revealed the complained-of evidence. He also explained that the account on the computer that was logged into caused the creation of a profile, which in turn caused the creation of data related to that profile. Furthermore, O'Brien testified that he was unaware of these computer accesses at the time he submitted his warrant affidavits in support of the warrants to search these computers, and he averred that nothing in the warrants came from the computers; rather, the information that the computers needed to be searched originated from Grizzle.

At trial, the defense's expert testified that his examination of the two computers revealed that whoever turned on and logged into these computers caused 2,605 files—for a maximum of 7.2 gigs of used space—to be modified, accessed, or created on the computer that was logged into and upwards of 2.1

gigs of files on the one that had simply been turned on. But defense's expert averred that he found nothing on the computers to contradict the State's expert regarding the fact that these accesses to the computers did not reveal the information that Henderson now complains should have been suppressed.

Viewing the evidence in a light most favorable to the trial court's ruling, the evidence demonstrates that the State obtained no evidence from these complained-of unauthorized accesses to the two computers, and there is no connection between these accesses and the complained-of evidence. Thus, the complained-of evidence was not subject to exclusionary rules. *See Wehrenberg v. State*, 416 S.W.3d 458, 468 (Tex. Crim. App. 2013) ([I]f there is no causal connection, then the evidence cannot be said to have been 'obtained' in violation of the law and thus is not subject to exclusion."). We overrule Henderson's fifth point.

4. Contents of Safes

In his seventh point, Henderson argues that the trial court erred by not suppressing the contents of two small safes that the police forced open during their searches—one found in his truck and the other in the Westchase apartment. Henderson concedes that the officers had warrants to search the truck and apartment. But Henderson does not explain what specific evidence he is complaining of having been admitted. Nonetheless, we agree with the State that when those things that appear to have been found in the safes were admitted at trial, Henderson affirmatively stated either "[w]e don't object" or "[n]o objection,"

and the record does not plainly indicate an intention not to abandon any objectionable error that he might have preserved through his suppression motion. *See Thomas v. State*, 408 S.W.3d 877, 881–82 (Tex. Crim. App. 2013) ("[T]his Court has long held that such an affirmative statement [as 'no objection'] constitutes a 'waiver' of the right to raise on appeal the error that was previously preserved [through a suppression motion]."); *see also Harper v. State*, 443 S.W.3d 496, 498–99 (Tex. App.—Texarkana 2014, pet. ref'd) ("Because defense counsel specifically stated he had no objection to the admission of the State's evidence and because the record does not plainly indicate an intention not to abandon the claim of error, the issue has not been preserved for review."). Thus, Henderson has failed to preserve any complaint about the introduction of the evidence found in these safes, and we overrule his seventh point.

E. The Indictment

In his eighth point, Henderson argues that "the indictment was fundamentally defective in that it did not reflect presentment to the court." Henderson's argument is that because the area in the indictment that would naturally have the name of the court filled in is blank, the indictment is flawed. As the State points out, the indictment clearly contains a typed entry at its top that the assigned court is the "297th District Court." The indictment is also signed by the grand jury foreman, and the district court's docket entry describes the indictment as the "Reindictment of Cause # 1245242R." Henderson candidly

admits, and the record reflects, that he did not object in the trial court about this alleged defect until after the jury had been sworn and impaneled.

A defendant who does not object to a defect, error, or irregularity of form or substance in a charging instrument before the day of trial waives and forfeits the right to object to the defect, error, or irregularity and may not raise the objection on appeal. Tex. Crim. Proc. Code Ann. art. 1.14(b) (West 2005); *Sanchez v. State*, 120 S.W.3d 359, 364 (Tex. Crim. App. 2003) (explaining that defendant has affirmative duty to object to any defect in indictment before trial and that failure to do so prevents defendant from raising claim of defect for the first time on appeal).

Because Henderson did not raise this alleged error prior to the jury being impaneled, he has forfeited our review of the issue. *See* Tex. Crim. Proc. Code Ann. art. 1.14(b); *Sanchez*, 120 S.W.3d at 364; *see also Teal v. State*, 230 S.W.3d 172, 182 (Tex. Crim. App. 2007) (holding appellant who did not object to substantive defect in indictment until after jury had been empaneled forfeited right to object to defect). Consequently, we overrule Henderson's eighth point.

F. Henderson's Right to Confront DNA Expert

In his ninth point, Henderson argues that the trial court denied him his right to confront a witness by admitting the testimony of the State's DNA expert who identified Ali, the victim in this case, as the statistically probable source of DNA found on items seized from Henderson. We disagree.

The Confrontation Clause of the Sixth Amendment guarantees the accused the right to confront the witnesses against him. U.S. Const. amend. VI; *Crawford v Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359 (2004); *Paredes v. State*, 462 S.W.3d 510, 514 (Tex. Crim. App.), *cert. denied*, --- U.S. ---, 136 S. Ct. 483 (2015). The United States Supreme Court has applied this rule to "testimonial" statements and held that such statements are inadmissible at trial unless the witness who made them either takes the stand to be cross-examined or is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Paredes*, 462 S.W.3d at 514 (*citing Crawford*, 541 U.S. at 54, 124 S. Ct. at 1365).

Testimonial statements include those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (*citing Crawford*, 541 U.S. at 52, 124 S. Ct. at 1364). And it is a Confrontation Clause violation whenever a "surrogate" witness testifies to the conclusions made in another's lab report because the report is considered a testimonial statement of the analyst who performed the tests when compiling the report. *Bullcoming v. New Mexico*, 564 U.S. 647, 655–56, 131 S. Ct. 2705, 2712 (2011); *Burch v. State*, 401 S.W.3d 634, 640 (Tex. Crim. App. 2013).

But when an expert testifies to her own opinion or conclusion, even when that conclusion or opinion is based on the laboratory work of others, there is no Confrontation Clause violation. *Paredes*, 462 S.W.3d at 512–16. In *Paredes*,

the Texas Court of Criminal Appeals considered a Confrontation Clause challenge to the admission of DNA analysis of a bloodstain on the defendant's shirt. The State called the forensic lab director to testify about the DNA analysis in the defendant's case. *Id.* The raw DNA data the director relied upon in reaching her conclusion was generated by three other analysts in an assembly-line batch process, and none of these three analysts were called to testify. *Id.* at 513. The director conducted the final analysis comparing the produced DNA profiles to the evidence and performed the "crucial analysis" of determining that the victim's DNA profile matched the DNA profile from the bloodstain on the defendant's shirt. *Id.* at 512–14. The court reasoned that the director's conclusion was her own and that the raw DNA data that she relied upon merely provided the basis for her opinion—thus, her testimony was not used as a substitute for out-of-court testimony. *See id.* Instead, the court stated that "the testifying [director] was more than a surrogate for a non-testifying analyst's report" and that "[w]ithout [the director's] independent analysis, the DNA profiles—the raw, computer-generated data . . . [stood] for nothing . . . ." *Id.* at 518–19. The court held that because the testifying director "used non-testimonial information—computer-generated DNA data—to form an independent, testimonial opinion" and because the defendant was given the opportunity to cross-examine her about her analysis, no Confrontation Clause violation existed. *Id.* at 519.

Here, during its case-in-chief, the State introduced testimony from Lauren Jones, a senior forensic DNA analyst for the University of North Texas Center for Human Identification. Jones's testimony pertained to calculating the probability of a DNA match found on items seized from Henderson with the DNA profile of Ali, the victim, found in CODIS—the national Combined DNA Index System. Like the director in *Paredes*, Jones relied upon raw DNA evidence that was generated by other lab analysts. And like in *Paredes*, Jones performed the analysis of determining that the victim's DNA profile matched the DNA found on items seized from Henderson. Moreover, like in *Paredes*, Jones testified to her own independent opinions and conclusions about the match between the DNA found on items seized from Henderson and Ali's DNA found in CODIS. Thus, her testimony served as more than a surrogate of the non-testifying analysts who generated the DNA reports, and without her testimony, the raw data would have stood for nothing. Additionally, like in *Paredes*, Henderson had the opportunity to cross-examine Jones's conclusions regarding the statistical probability that the DNA found on the items seized matched Ali's DNA.

In coming to a contrary conclusion, Henderson argues that Jones's testimony is akin to the testimony found in the Supreme Court's decision in *Bullcoming* and in the court of criminal appeals's holding in *Burch*. *Bullcoming*, 564 U.S. at 655, 131 S. Ct. at 2712; *Burch*, 401 S.W.3d at 640. But the significance of those decisions is that in both *Bullcoming* and *Burch*, the testifying witness averred directly about the conclusions of a non-testifying expert's report,

unlike here and in *Paredes*, where the testifying experts merely utilized others' lab reports as the raw data in forming their own expert opinions. We hold that Henderson's Confrontation Clause rights were not violated by Jones's testimony. *See Whitfield v. State*, --- S.W.3d ---, 2017 WL 946757, at *5 (Tex. App.—Houston [14th Dist.] Mar. 9, 2017), pet. ref'd) (holding that admission of laboratory supervisor's testimony, concluding that defendant could not be excluded as source of DNA profile generated from bloodstain on victim's shorts, did not violate defendant's rights under Confrontation Clause despite supervisor's use of raw data generated by other lab analysts in forming opinion). We overrule Henderson's ninth point.

G. Spousal Privilege

In his tenth point, Henderson argues that the trial court abused its discretion by allowing Wife to testify to what he deems privileged spousal communications. Specifically, Henderson complains that Wife was allowed to testify to:

> (1) Text messages sent from [Henderson] to his wife after their daughter out-cried about the sexual assault but before the murder stating: "please talk to me"; "I need to talk"; "I need you--without you I'd rather die"; "If you don't answer, I am coming to check on you"; [and] "Please go to room and talk to me[.]"
>
> (2) Oral phone communications to his wife stating: that he had a gun and was going to kill himself numerous times; that he was going to have someone kill him so she could receive the insurance; that he admitted taking large sums of money out of the checking accounts; [and] that, on the week of trial, he asked her to have their daughter not come to court to testify against him.

We review a trial court's ruling denying applicability of a privilege for an abuse of discretion. *Carmona v. State*, 947 S.W.2d 661, 664 (Tex. App.—Austin 1997, no pet.). We reverse the ruling only if "the trial court applied an erroneous legal standard, or when no reasonable view of the record could support the trial court's conclusion under the correct law and the facts viewed in the light most favorable to its legal conclusion." *Id.* (*quoting DuBose v. State*, 915 S.W.2d 493, 498 (Tex. Crim. App. 1996)). A party asserting a privilege has the burden of showing that the privilege applies. *McAfee v. State*, 467 S.W.3d 622, 645 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *see Carmona*, 947 S.W.2d at 663.

Rule 504 of the Texas Rules of Evidence provides that "[a] person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to the person's spouse while they were married." Tex. R. Evid. 504(a)(2). A communication is confidential "if a person makes it privately to the person's spouse and does not intend its disclosure to any other person." Tex. R. Evid. 504(a)(1).

Conversely, communication is not privileged if it is not made privately or its non-disclosure was not intended by the person making it. *See* Tex. R. Evid. 504(a)(1); *Zimmerman v. State*, 750 S.W.2d 194, 199 (Tex. Crim. App. 1988). The privilege also does not apply if the communication was made, "wholly or partially," to enable or aid anyone to commit or plan to commit a crime or fraud. Tex. R. Evid. 504(a)(4)(A). Furthermore, the privilege does not apply where the communicating spouse has revealed the underlying facts of the communication

to third parties, even where he or she has not revealed the communication itself. *See Rivera v. State*, No. 05-92-02424-CR, 1993 WL 378066, at * 4 (Tex. App.—Dallas Sept. 28, 1993, no pet.) (not designated for publication).

Here, viewing the evidence in a light most favorable to the trial court's determination that the spousal privilege did not apply, the trial court could have concluded that the lion's share of the testimony of which Henderson complains was made in furtherance of a crime or fraud or that it wasn't intended to remain confidential, including: that he had a gun and was going to kill himself or that he was going to have someone kill him so Wife could receive funds from his life insurance policy (fraud and motive for the murder); that he admitted taking large sums of money out of the checking accounts (in furtherance of his scheme to murder Ali, change identity, and flee the country); and that on the week of trial, he asked Wife to have Daughter not come to court to testify against him—a communication that could have been in furtherance of a fraud and one that by its content was intended to be conveyed to Daughter. As for the texts that Henderson complains about, he points to no evidence in the record that these communications were intended to be private, and he carried the burden to establish that the spousal privilege applies to these texts. We cannot conclude that no reasonable view of the record supports the trial court's conclusion that the spousal privilege did not apply to the complained-of evidence. We overrule Henderson's tenth point.

IV. Conclusion

Having overruled all ten of Henderson's points on appeal, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER and MEIER, JJ.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

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Tex. R. App. P. 47.2(b)

DELIVERED: September 21, 2017