IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,051

WARREN DARRELL RIVERS, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NO. 0475122
IN THE 228TH JUDICIAL DISTRICT COURT
HARRIS COUNTY

HERVEY, J., delivered the opinion of the Court in which KELLER, P.J., KEASLER, RICHARDSON, YEARY, NEWELL, KEEL, and WALKER, JJ., joined. ALCALA, J., concurred.

OPINION

In 1988, Warren Darrell Rivers was convicted of capital murder and sentenced to death for intentionally causing the death of eleven-year-old C.N. while in the course of committing or attempting to commit aggravated sexual assault. TEX. PENAL CODE § 19.03(a)(2). We affirmed the 1988 conviction and sentence. *Rivers v. State*, No. AP-

APPENDIX A

70,776 (Tex. Crim. App. Apr. 14, 1993) (not designated for publication). Following a grant of federal habeas corpus relief, the trial court held a new punishment hearing in November 2014. *Rivers v. Quarterman*, 661 F. Supp. 2d 675 (S.D. Tex. Sept. 30, 2009). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.0711, §§ 3(b) and 3(e), the trial judge sentenced Rivers to death. TEX. CODE CRIM. PROC. art. 37.0711, § 3(g).[1] Direct appeal to this Court is automatic. *Id.* art. 37.0711, § 3(j). Rivers raises seven points of error.[2] After reviewing his points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment sentencing Rivers to death.

FACTUAL SUFFICIENCY—DELIBERATENESS

In point of error three, Rivers contends that the evidence was factually insufficient to support the jury's affirmative answer to the deliberateness special issue, which asks "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased

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[1]Unless otherwise indicated, all future references to Articles refer to the Code of Criminal Procedure.

[2] Rivers has failed to comply with Rule 38.1(b) of the Texas Rules of Appellate Procedure because, even though his brief includes a table of contents, that table lists his issues or points of error simply as "APPELLANT'S FIRST POINT OF ERROR," "APPELLANT'S SECOND POINT OF ERROR," and so forth. TEX. R. APP. P. 38.1(b) (stating that the table of contents "must indicate the subject matter of each issue or point, or group of issues or points"). Rivers has also failed to comply with Rule 38.1(f) because he did not include an "Issues Presented" section nor did he concisely state "all issues or points [he has] presented for review." *Id.* at 38.1(f). Nonetheless, in the interest of justice we have attempted to discern his claims, but to the extent that we cannot, we reject his others as inadequately briefed. *Id.* at 38.1(i); *Lucio v. State*, 351 S.W.3d 878, 896–97 (Tex. Crim. App. 2011).

or another would result[.]"[3] TEX. CODE CRIM. PROC. art. 37.0711, § 3(b)(1). However, we do not review the evidence supporting the jury's answer to the deliberateness special issue for factual sufficiency.[4] *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Point of error three is overruled.

LEGAL SUFFICIENCY—FUTURE DANGEROUSNESS

In point of error five, Rivers alleges that the evidence was legally insufficient to support the jury's affirmative answer to the future-dangerousness special issue. He argues that the evidence presented at his second punishment trial showed that his "victims are a specific, vulnerable subset of society" (i.e., children) to whom he will not have access in prison. Relying on our decision in *Berry v. State*, 233 S.W.3d 847 (Tex. Crim. App. 2007), he asserts that the evidence was therefore insufficient to show that he would be a danger in prison society, which consists of only adults. Rivers's argument has no merit.

The future-dangerousness special issue requires the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that

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[3] Rivers does not contend that the evidence was legally insufficient to support the jury's affirmative answer to the deliberateness special issue.

[4] Rivers relies on two cases from this Court to argue that the evidence supporting a jury's affirmative answer to the deliberateness special issue may be reviewed on appeal for factual sufficiency: *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), and *Wardrip v. State*, 56 S.W.3d 588 (Tex. Crim. App. 2001). It is true that, "[i]n *Clewis*, we established 'the proper standard of review for factual sufficiency of the elements of the offense.'" *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). And, "[i]n *Wardrip*, we held that 'the deliberateness special issue may be reviewed for factual sufficiency using the *Clewis* standard.'" *Id.* But Rivers fails to acknowledge that we later "overruled *Clewis* and in effect, overruled the *Wardrip* factual-sufficiency holding as well." *See id.* (citing *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010)).

would constitute a continuing threat to society[.]" TEX. CODE CRIM. PROC. art. 37.0711, § 3(b)(2). In deciding that special issue, the jury is entitled to consider all of the evidence admitted at both the guilt-innocence and punishment phases of trial. *Devoe v. State*, 354 S.W.3d 457, 462 (Tex. Crim. App. 2011). The circumstances of the offense and the events surrounding it may be sufficient in themselves to sustain an affirmative answer to the future-dangerousness special issue. *Id.*; *Hayes v. State*, 85 S.W.3d 809, 814 (Tex. Crim. App. 2002). An escalating pattern of violence or disrespect for the law may also support a finding of future dangerousness. *Swain v. State*, 181 S.W.3d 359, 370 (Tex. Crim. App. 2005); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

We review all of the evidence in the light most favorable to the jury's finding. *Buntion v. State*, 482 S.W.3d 58, 66 (Tex. Crim. App. 2016); *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Assessing the evidence and all reasonable inferences from it in this light, we determine whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Buntion*, 482 S.W.3d at 66; *Williams v. State*, 273 S.W.3d 200, 213 (Tex. Crim. App. 2008). The future-dangerousness special issue focuses upon the defendant's character for violence and his internal restraints, asking whether he would constitute a continuing threat whether in or out of prison. *Coble v. State*, 330 S.W.3d 253, 268–69 (Tex. Crim. App. 2010).

Viewed in the light most favorable to the jury's finding, the evidence shows that,

on the evening of May 3, 1987, the then-twenty-year-old Rivers lured the eleven-year-old C.N. to a vacant house. While the boy was alive, conscious, and resisting, Rivers inserted the unlubricated end of a broom handle at least nine inches into C.N.'s rectum, abrading and lacerating his anus and perforating his colon. Rivers also severely beat C.N. with a broom stick, strangled him, and stabbed him with a knife three times in the back and once in the chest. Although one of the stab wounds to C.N.'s back was superficial, the remaining stab wounds were 3½ inches deep. The deep stab wounds to C.N.'s back hit and sliced one of his kidneys in half. These were fatal injuries, but not immediately so. C.N. died from the deep stab wound to his chest, which penetrated his heart and was almost instantly fatal.

During his assault on C.N., either before or after C.N.'s death, Rivers ejaculated onto a washcloth that was found near C.N.'s naked and battered body. A witness who saw Rivers a few hours after he assaulted and murdered C.N. testified that his demeanor was "happy" and "prideful," as if he had "[done] something good." The following day, Rivers's demeanor was similarly elated and celebratory.

In addition to the facts of the instant offense, the State presented evidence of Rivers's criminal record and bad acts preceding C.N.'s murder, which we summarize as follows. Rivers was the largest male student at his middle school, and he had an unpredictable temperament which manifested itself in a frequently changing emotional state. He bullied smaller students into submitting to his demands, disrupted class,

disrespected and intimidated teachers and staff members, and was suspended from school after an incident in which he physically threatened a female teacher.

When he was fifteen years old, Rivers lured an eight-year-old boy who lived in the same apartment complex into an empty apartment. He then physically and sexually assaulted the boy. In a separate incident on that same day, Rivers lured the boy's six-year-old brother into an empty apartment and sexually assaulted him.

For his sexual assault of the eight-year-old boy, Rivers was adjudicated delinquent for aggravated sexual assault of a child and placed in the custody of the Texas Youth Commission (TYC). While at TYC, Rivers, who possessed an average-range IQ, demonstrated the ability to act appropriately when he wished to do so. Despite this, he physically intimidated and bullied other juveniles, became a "negative leader," and was frequently the subject of disciplinary action. Among other misconduct, Rivers stole food from other juveniles and persuaded the residents of his dormitory to fight the residents of another dormitory. Rivers did not typically take responsibility or express remorse for his actions, and he became belligerent and surly when punished for them. Although twelve months was the typical length of a stay in TYC, Rivers remained there for twenty months because of his bad behavior.

Following Rivers's release from TYC and approximately a month before Rivers killed C.N., police officers responded to a disturbance involving Rivers and his mother. As the officers arrived at the house, they observed that Rivers was in a rage, screaming,

"Where is my knife? I'm going to kill that nigger. Where is my knife?" Rivers responded belligerently when the officers tried to calm him, and he continued searching for his knife. After grabbing something from a kitchen drawer, R\ivers darted towards the front door, prompting one of the officers to draw his service weapon. The officer did not fire his weapon, however, because Rivers's mother jumped in front of him. Rivers shoved his screaming mother out of the way, after which the officers attempted to subdue him because they believed that he had stabbed his mother. Rivers wrestled and fought the officers for more than a minute before back-up officers arrived, at which point he ceased struggling. The officers arrested Rivers for assaulting his mother and for resisting arrest. Upon searching him, the officers found a buck knife in the side of his shoe and a tear gas gun in his jacket pocket.

The facts of the instant offense, Rivers's criminal history, and other evidence showing his lack of remorse and escalating pattern of violence and disrespect for the law are sufficient to support the jury's affirmative answer to the future-dangerousness special issue. *Devoe*, 354 S.W.3d at 462; *Swain*, 181 S.W.3d at 370; *see Young v. State*, 283 S.W.3d 854, 864 (Tex. Crim. App. 2009) (noting that evidence that the defendant had previously committed aggravated sexual assault supported the jury's finding of future dangerousness). We have also recognized that a stabbing death is particularly brutal. *King*, 953 S.W.2d at 272. "[A] knife is a weapon which by its very nature, forces the user to be in such close proximity to his victim that he is often touching him or comes into

contact with him on each blow." *Id.* (quoting *Martinez v. State*, 924 S.W.2d 693, 696 (Tex. Crim. App. 1996)). Further, "the character of the weapon is such that several thrusts are often utilized in order to ensure death—each additional thrust potentially indicating to any rational juror that such a personal act requires a wanton and callous disregard for human life." *Id.*

The State also presented evidence that Rivers's character for violence had not changed. *See Buntion*, 482 S.W.3d at 67. Writings found in his cell in 2006, 2010, and 2011 were filled with violent sexual ideations, including the anal rape of an eight-year-old girl, the gang rape of another girl, and scenes featuring the domination, torture, and murder of children. This evidence supported a finding that the forty-seven-year-old Rivers still possessed the same unwholesome sexual interest and character for murderous brutality toward children that he did at ages fifteen and twenty. *See Coble*, 330 S.W.3d at 269–70.

Other evidence in the record suggested that Rivers's continuing character for violence was not limited to children. While he was in prison following his original capital-murder trial, Rivers threatened to injure or kill correctional officers, participated in a conversation with other inmates about planning the rape of a female correctional officer, created disturbances, and violated other prison rules. While he was in the Harris County Jail awaiting his second punishment trial, Rivers assaulted an older, physically smaller, shackled inmate for no apparent reason. Rivers, who was restrained by only

handcuffs, headbutted the inmate, causing the inmate to fall to the ground. He then repeatedly kicked the inmate, taking advantage of the inmate's more limited range of movement. When ordered by a jail guard to stop the assault, Rivers pretended that he did not know what the guard was talking about.

Rivers's reliance on *Berry*, in which we found the evidence insufficient to establish the defendant's future dangerousness, is misplaced. *See Berry*, 233 S.W.3d at 864. The evidence in Berry's case showed that her victim pool was extremely limited (i.e., confined to a subset of her own children who had been fathered by someone other than her preferred mate), she had never been violent in any other context, and she had no criminal record. *Id.* at 863–64. The evidence also suggested that there was a very low probability that she would have any more children if sentenced to life in prison. *Id.*

Rivers's case is distinguishable in that he had a significant prior criminal history, which included aggravated sexual assault of a child, and he demonstrated an escalating pattern of violence and disrespect for the law. *See Devoe*, 354 S.W.3d at 462; *Swain*, 181 S.W.3d at 370. The evidence further supported a finding that Rivers "is dangerous to a broader range of potential victims than only" children. *See Estrada v. State*, 313 S.W.3d 274, 283 (Tex. Crim. App. 2010) (distinguishing *Berry*).

In sum, the evidence presented at trial is sufficient to support the jury's affirmative answer to the future-dangerousness special issue. Point of error five is overruled.

PRIOR DEATH SENTENCE

In point of error one, Rivers draws our attention to the following statement by the Supreme Court in *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006): "[A] state capital sentencing system must: [1] rationally narrow the class of death-eligible defendants; and [2] permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Id.* (rejecting a facial constitutional challenge to a Kansas death-penalty statute requiring the imposition of the death penalty when the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise). Rivers specifically focuses on the second of the foregoing requirements. *Id.* According to him, under *Marsh*, his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment were violated because the jury was made aware that he had previously received the death penalty for C.N.'s capital murder.

To the extent Rivers is attempting to mount a facial constitutional challenge to Texas's death penalty statute on the grounds that the statute does not permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime, his argument has no merit. *See Mosley v. State*, 983 S.W.2d 249, 263–64 & n.18 (Tex. Crim. App. 1998) (op. on reh'g).

To the extent Rivers is attempting to raise an as-applied constitutional challenge to Texas's death penalty statute, he has inadequately briefed this point of error:

> An appealing party's brief must contain a "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Failure to provide substantive legal analysis—"to apply the law to the facts"—waives the point of error on appeal. If the appealing party fails to meet its burden of adequately discussing its points of error, this Court will not do so on its behalf.

Linney v. State, 413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (Cochran, J., concurring in the refusal to grant petition for discretionary review) (footnotes omitted); *see Lucio*, 351 S.W.3d at 896; *Swearingen v. State*, 101 S.W.3d 89, 100 (Tex. Crim. App. 2003).

Rivers is correct that we have cited *Marsh* for the proposition that "'a state capital sentencing system must . . . permit a jury to render a reasoned, individualized sentencing determination . . . .'" *See Coble*, 330 S.W.3d at 269 (quoting *Marsh*, 548 U.S. at 173–74). However, Rivers does not explain how the jury's alleged awareness of his former death sentence made it unable to render a reasoned, individualized sentencing determination. Thus, Rivers has failed to apply the law to the facts as the appellate rules require. *See* TEX. R. APP. P. 38.1(i); *Lucio*, 351 S.W.3d at 896; *Swearingen*, 101 S.W.3d at 100.

However, in the interest of justice, we have examined the record and have found no references to Rivers's prior death sentence. The passages cited by Rivers include only discussions that he had already been found guilty and that, if asked to serve on the jury, the veniremen would have to assess only Rivers's punishment. Even if we assume that the instances Rivers complains about could possibly be fairly characterized as direct references to his prior death sentence—or that the jury would have necessarily and reasonably understood them as such—the complained-of instances did not so infect

Rivers's punishment retrial with unfairness that they rose to the level of a due process violation or misled the jury regarding its sentencing role. *See, e.g., Muniz v. Johnson*, 132 F.3d 214, 223–24 (5th Cir. 1998) ("[T]hese comments were isolated enough that they did not mislead the jury in its sentencing role or diminish its sense of responsibility in considering the death penalty."). Point of error one is overruled.

MOTION TO INCLUDE LIFE WITHOUT PAROLE

In point of error two, Rivers alleges that the trial court violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when it denied his motion to include life without parole as a sentencing option and instead tried him pursuant to the provisions of Article 37.0711.[5] However, "[t]he trial court did not err by refusing to apply a punishment provision that, by its own terms, does not apply to an offense committed in" 1988. *See Buntion*, 482 S.W.3d at 105. Rivers also fails to acknowledge that "we have repeatedly rejected claims that the applicable sentencing scheme is unconstitutional for failing to provide the jury with the sentencing option of life without parole." *Id.* (citing *Luna v. State*, 268 S.W.3d 594, 609 (Tex. Crim. App. 2008)). Point of error two is overruled.

BRAIN DAMAGE

In point of error four, we understand Rivers to make two claims. First, he alleges

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[5]Article 37.071 governs death-penalty cases when the defendant was convicted after September 1, 1991. Because Rivers was convicted of capital murder in 1988, Article 37.0711 governs his case. *Compare* TEX. CODE CRIM. PROC. art. 37.071, *with id.* art. 37.0711.

that he is categorically exempt from execution under the Supreme Court's holding in *Roper v. Simmons*, 543 U.S. 551 (2005), due to his age at the time of the offense. In *Simmons*, the Supreme Court held that the Eighth and Fourteenth Amendments "forbid[] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* 543 U.S. at 578. However, the record in this case shows that Rivers was twenty years old when he committed the instant offense. Thus, *Simmons* is inapplicable.

Second, Rivers argues that he is categorically exempt from execution under the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), because even though he is not intellectually disabled, he suffers from brain damage that reduces his moral culpability and makes a death sentence a disproportionate punishment. In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the execution of intellectually-disabled offenders. *Id.* at 321. To the extent Rivers contends that the rule announced in *Atkins* extends to, or should extend to, individuals who have brain damage but are not intellectually disabled, he has not supported his claim with any persuasive authority. *See Soliz v. State*, 432 S.W.3d 895, 903–04 (Tex. Crim. App. 2014) (concluding that the defendant had failed to show an emerging national consensus in favor of prohibiting the execution of non-intellectually-disabled but brain-damaged adults convicted of capital murder). Furthermore, in asking us to evaluate the factual sufficiency of the evidence

supporting the jury's affirmative answer to the deliberateness special issue, he merely re-urges his third point of error, which we have already overruled.

We also decline to extend *Atkins*'s categorical exemption to non-intellectually-disabled but brain-damaged adults. "At the punishment phase of a death-penalty case, evidence of brain damage . . . is relevant evidence that may be considered by the jury along with other relevant evidence. The weighing of this type of evidence is a subjective determination undertaken by each individual juror." *Id.* at 904. In this case, the record shows that the jurors heard Rivers's evidence of brain damage, as well as the other punishment evidence, and they appear to have made a normative judgment that the evidence did not warrant a life sentence. *Id.* We "will not second-guess the jury's determination." *Id.* Point of error four is overruled.

ADMISSION OF WRITINGS

In point of error six, Rivers contends that the trial court erred by admitting evidence of writings found in his cell. As discussed in our analysis of point of error five, these writings were filled with violent sexual ideations. Rivers argues that the danger of unfair prejudice substantially outweighed the probative value of this evidence. He asserts that the writings were thus inadmissible under Texas Rule of Evidence 403. This claim has no merit.

When an appellant complains that a trial court erred under Rule 403 by admitting his writings, we review the ruling for an abuse of discretion. *See Green v. State*, 934

S.W.2d 92, 104 (Tex. Crim. App. 1996). We will not find an abuse of discretion unless the trial court's decision fell outside the zone of reasonable disagreement. *Id.*

Here, the trial court did not abuse its discretion by admitting the writings into evidence. The record shows that the State introduced Rivers's writings as evidence of his character for violence, which was relevant to his future dangerousness. *Coble*, 330 S.W.3d at 268–69. In similar circumstances, we have determined that the danger of unfair prejudice from such evidence did not outweigh its probative value to show future dangerousness. *See Green*, 934 S.W.2d at 104 (concluding that the defendant's description of himself as "trigger happy" was suggestive of future dangerousness and not unfairly prejudicial under Rule 403); *see also Corwin v. State*, 870 S.W.2d 23, 35 (Tex. Crim. App. 1993) (concluding that the jury could infer facts about the defendant's character for violence from his drawing of a large green monster holding a bloody axe and a woman's scalp). Point of error six is overruled.

DELIBERATENESS SPECIAL ISSUE

In point of error seven, Rivers alleges that the deliberateness special issue, found in Article 37.0711, § 3(b)(1), is void for vagueness under *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that 18 U.S.C. § 924(e)(2)(B)—the "residual clause" of the federal Armed Career Criminal Act of 1984 (ACCA)—is void for vagueness.[6] *See Johnson*, 135 S. Ct. at 2555–57, 2563. Rivers asserts that, by holding the

[6] In *Johnson*, the Supreme Court specifically considered the ACCA's definition of "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that

ACCA's residual clause to be void for vagueness, the Supreme Court "ma[de] it clear that statutory challenges do not have to be consigned to the dungeons of analysis when they offend the due process clause due to poor drafting." Rivers does not otherwise explain why *Johnson*, a decision involving a provision of federal statutory law, has any bearing on the constitutionality of Texas's deliberateness special issue. Accordingly, point of error seven is inadequately briefed. *See* TEX. R. APP. P. 38.1. In addition, we have previously rejected the same or similar arguments alleging that Article 37.0711 § (3)(b)(1) is void for vagueness. *See, e.g., Chamberlain v. State*, 998 S.W.2d 230, 237–38 (Tex. Crim. App. 1999). To the extent Rivers asks us to revisit the issue, we decline to do so. Point of error seven is overruled.

Having considered Rivers's points of error and finding them to be without merit, we affirm the judgment of the trial court.

Delivered: December 20, 2017

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"(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*" *See Johnson*, 135 S. Ct. at 2555 (emphasis in original) (citing 18 U.S.C. § 924(e)(2)(B) and identifying the italicized language as the ACCA's "residual clause").

Search documents in this case: Search

No. 17A1043

Title:	**Warren Darrell Rivers, Applicant** **v.** **Texas**
Docketed:	March 27, 2018
Lower Ct:	Court of Criminal Appeals of Texas
Case Numbers:	(AP-77051)

DATE	PROCEEDINGS AND ORDERS
Mar 20 2018	Application (17A1043) to extend the time to file a petition for a writ of certiorari from March 20, 2018 to May 19, 2018, submitted to Justice Alito. **Main Document** **Lower Court** **Orders/Opinions** **Proof of Service**
Mar 28 2018	Application (17A1043) granted by Justice Alito extending the time to file until May 21, 2018.

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APPENDIX B

WARREN DARREL RIVERS,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from the 228th District Court of Harris County

No. 70,776

OPINION

After a trial held in December 1988, a Harris County jury found appellant, Warren Rivers, guilty of the May 3, 1987, capital slaying of an eleven-year-old boy referred to herein as "the deceased." The aggravating element of the murder was appellant's aggravated sexual assault of the deceased.[1] At the trial's punishment phase, the jury answered affirmatively the punishment issues set forth in Article 37.071(b) of the Texas Code of Criminal Procedure,[2] and appellant was sentenced to death. Direct appeal to this Court was then automatic under Article 37.071(h).[3] We will affirm.

In eight points of error, appellant challenges: the trial court's refusal to find that appellant made a prima facie case that

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[1] The relevant language from the indictment read that appellant "did then and there unlawfully while in the course of committing and attempting to commit the aggravated sexual assault of [the deceased], . . . [did] intentionally cause the death of [the deceased] by stabbing [the deceased] with a knife."

[2] At the time of appellant's trial, Article 37.071 provided in relevant part:

> (b) On conclusion of the presentation of the evidence [at the punishment phase], the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> (c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

The record reflects that only issues (b)(1) and (b)(2) were submitted to the jury with respect to appellant's conduct in murdering the deceased.

[3] Unless otherwise indicated, all article references are to the Texas Code of Criminal Procedure.

the prosecution used its peremptory challenges in a racially motivated manner; the trial court's admission into evidence of a "mug shot" of appellant; the trial court's admission into evidence of testimony about the deceased's friendly personality; the trial court's admission into evidence of the testimony of the deceased's mother; the trial court's admission into evidence of a picture of the deceased; and the trial court's refusal to instruct the jury on mitigating evidence. We will address appellant's points of error in the order in which they occurred during the course of the trial.

Since appellant does not contest the sufficiency of the evidence, we will engage in only a brief recitation of the facts. On May 3, 1987, the deceased's mother sent the deceased to get some cardboard boxes. When the boy did not return, the mother went searching for her son, but could not find him. Sometime on May 4, 1987, a neighbor informed the mother that the body of a little boy had been found in a house. The body, which exhibited multiple stab wounds, was found in a room with a broken, bloody broomstick, and numerous articles of clothing. The body was later identified as the deceased. The autopsy revealed that the broomstick had been forcibly inserted through the deceased's rectum so far as to extend into his intestine, and that a wound to the chest had caused the deceased's death.

Based upon the testimony of two witnesses who saw the deceased riding his bicycle with appellant on the evening of May 3, 1987, the police arrested appellant. Appellant admitted that he went to the house where the deceased's body had been found to have sex with the deceased. Appellant also told the police that the deceased had caused the fresh scratch on his face and that the deceased's bicycle was in a field nearby.

In point of error eight, appellant argues that the trial court erred in refusing to find that appellant had made a prima facie case that the State used its peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Appellant directs our attention to the fact that the State used seven peremptory challenges, three of which were

directed at venirepersons who were black. The trial court held a hearing and found that appellant failed to make a prima facie case of racial discrimination. Appellant asks us to remand this case to the trial court for a hearing "to afford the State the opportunity to rebut the presumption . . . that its peremptory challenges were used to discriminate against three black jurors and to afford Appellant the opportunity to offer proof that the racially neutral explanation articulated by the prosecutor, if any, is a pretext . . ." The State argues that appellant has waived any error and that no prima facie case of discrimination was made.

The record reveals that at the hearing, the State offered to read into the record its reasons for striking the three black members of the venire. Appellant's attorney objected to this offer and the trial judge refused to allow the State to offer its reasons for striking the veniremembers. We do not believe that appellant should now be able to seek that which he formerly prohibited by objecting, i.e., a recitation of the State's reasons for striking the three potential jurors. While a violation of Batson constitutes an error of constitutional magnitude, this Court has previously held that even errors of constitutional magnitude may be waived. Briggs v. State, 789 S.W.2d 918, 924 (Tex.Cr.App. 1990). Appellant waived any error related to a Batson claim by objecting to the State's offer to articulate its reasons for striking the three veniremembers who were black. Therefore, we overrule appellant's point of error eight.

In point of error seven, appellant complains of the trial court's admission into evidence of a "mug shot" of appellant. At trial, the State introduced a photospread with pictures of six different men. These pictures had been used by the police during the investigation of the deceased's death. The pictures are frontal views of the faces of six black males, one of which is appellant. Lines indicating the height of each subject appear in the background of five of the six pictures, including appellant's. Appellant argues that even though the photographs contain no information regarding the date or place of arrest, the pictures

were so inherently and highly prejudicial that his conviction should be reversed. The State argues that appellant's objection on appeal differs from that offered at trial, that nothing in the record supports appellant's assertion that the pictures are "mug shots," that the pictures do not constitute evidence of an extraneous offense, and that the trial court committed no error in admitting the photograph.

At trial, appellant objected to the admission of the photographs

> first on the grounds that these are obviously mug shots showing a [sic] depicting lines behind the head of the number three suspect, which has been a person who has been already identified as Warren Rivers. They are obvious on their face to be mug shots, and they show the heights and numbers on the sides of the picture that is depicted as Warren Rivers.

We disagree with the State's contention that this objection differs from that argued on appeal. We conclude, however, that the objection is insufficient to preserve any error regarding prejudice. The trial judge must specifically be given the opportunity to assess the probative value and the prejudicial effect of evidence in order to preserve such a question for review. Montgomery v. State, 810 S.W.2d 372, 388 (Tex.Cr.App. 1990). Appellant's objection in no way directed the trial court to weigh the probative value and prejudicial effect of the photograph. Therefore, we overrule appellant's point of error seven.

In point of error six, appellant complains of the trial court's admission into evidence of the testimony of the deceased's sister regarding the deceased's friendly personality. The deceased's sister testified that when the deceased would meet a new person, "he acts like he been knowing them. He say, hi, my name is C___. And then he might strike up a conversation. And then the next time he see that person he say, that's my friend. I know him from wherever they met him." Immediately prior to this testimony, appellant lodged two objections, each of which stated that the testimony was "not relevant." Appellant argues that the admission of the testimony violated Texas Rule of Criminal Evidence 402 and the Eighth Amendment to the United States Constitution because the

testimony was not relevant "and its sole purpose was to inflame the minds of the jury." The State argues that the evidence was relevant and that appellant waived any error by failing to object when the witness related the same information earlier in her testimony.

The record reveals that the witness did testify about the deceased's friendly personality moments before she gave the testimony of which appellant complains. Prior to the latter testimony, the following exchange between the prosecutor and the witness occurred:

> [PROSECUTOR]: Was your brother the type of person who made friends easily?
>
> [WITNESS]: Yes.
>
> [PROSECUTOR]: Would it be possible for your brother to see somebody on the street and say hello and in the next moment be his friend?
>
> [WITNESS]: Yes.
>
> [PROSECUTOR]: And had you observed your brother do this often?
>
> [WITNESS]: Yeah, yes.

Appellant lodged no objection to this line of questioning. When a defendant objects to evidence, but the same evidence is introduced at another time without objection, the defendant may not complain on appeal about the admission of that evidence. Wilkerson v. State, 736 S.W.2d 656, 662 (Tex.Cr.App. 1987). The admission of this testimony without objection also waives any error concerning appellant's Eighth Amendment claim. See Briggs, 789 S.W.2d at 924.

Moreover, assuming arguendo that appellant preserved the error, we would still be unable to conclude that the trial court erred in admitting the testimony. The record reveals that the deceased never mentioned knowing appellant. The testimony of the deceased's sister is relevant because it provides an explanation concerning how the deceased came to be in appellant's company. Whether this evidence was more probative than prejudicial constitutes another question, which appellant's relevance objection would have been insufficient to preserve. See Montgomery, 810 S.W.2d at 388. Having concluded both that appellant waived any error and

that the evidence was relevant, we overrule appellant's point of error six.

Appellant's points of error three, four, and five are interrelated. In points of error three and five, appellant complains of the trial court's admission into evidence of the testimony of the deceased's mother. In point of error four, appellant complains of the trial court's admission into evidence of a photograph depicting the deceased smiling.

Appellant argues that the trial court should have prohibited the deceased's mother from testifying because her testimony added no material evidence to the case. Appellant argues that the picture should have been suppressed because the deceased's identity was never contested. Appellant contends that the testimony and the photograph were introduced by the State for the purpose of inflaming the jury. In support of this, appellant directs our attention to the fact that the deceased's mother cried while she was testifying. Also, appellant directs our attention to the State's argument during the punishment phase during which the prosecutor described the photograph of the deceased as depicting "the work of God, which is a beautiful work."[4] The State argues in response that appellant failed to preserve any error for review by lodging only a general objection before the deceased's mother testified. Concerning the photograph of the deceased, the State argues that the trial judge did not abuse its discretion in admitting the picture into evidence and that the same information was relayed to the jury through the testimony of the deceased's mother.

Concerning the testimony of the deceased's mother, we disagree with the State's contention that appellant's objection failed to preserve error. The record shows that appellant objected immediately after the State called the witness to testify. A hearing was held outside the presence of the jury. At the hearing, appellant

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[4] On appeal, appellant assigns no point of error to this argument. We note, however, that appellant lodged no objection to the prosecutor's argument at trial, which would waive any error in the argument. Tex. R. Crim. Evid. 103(a)(1).

argued that the testimony from the deceased's mother would add nothing to the case, but would greatly prejudice the jury. The State made a proffer concerning what the testimony would show. Appellant reurged his objections that the testimony was irrelevant and would cause the jury to render a decision based upon sympathy and outrage rather than upon a dispassionate analysis of the facts. The trial court overruled the objections, and refused to allow appellant to have a running objection.[5] The trial court then informed appellant that he could still lodge objections to specific questions. We conclude that appellant lodged a sufficiently specific objection at a proper time and preserved the issue for review.

We disagree, however, with appellant's contention that the testimony was irrelevant. While other witnesses testified about some of the same subject matter about which the deceased's mother testified, the deceased's mother related the facts pertaining to how she sent the deceased on an errand to find some boxes, how the deceased left on his bicycle to travel the short distance to a fruit stand to get those boxes, and how the deceased failed to return to the house. This evidence was relevant to the context of the offense, as it provided an explanation for how the deceased came to be in the area where he met appellant. The analogous case of Mayes v. State, 816 S.W.2d 79 (Tex.Cr.App. 1991) supports this analysis.

In Mayes, the State introduced evidence that appellant had committed a crime while in the administrative segregation unit of a prison. 816 S.W.2d at 82. The evidence showed that the administrative segregation unit was where inmates who were "a threat to the general population of the prison" were held. Id. This Court held that "character evidence offered on the rationale that it is 'background' evidence helpful to a jury, but apparently in conflict with the proscriptions of [Texas Rule of Criminal Evidence] 404(b), is not admissible as one of the alternative

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[5] We need not reach the question of whether appellant was properly denied a running objection in this case because of our disposition of this point of error on other grounds.

purposes [for which] such evidence may be introduced under Rule 404(b)." Id. at 88. We also stated, however, that such background evidence was relevant. Id. at 85. In this case, the majority of the testimony of the deceased's mother contained no character elements and did no more than set the context of the offense.

While the deceased's mother was testifying, appellant lodged no objections to the cumulative nature of the testimony or to the prejudicial aspects thereof.[6] This Court has previously held that when a body of evidence consists of admissible and inadmissible components, a general objection fails to preserve error. Wintters v. State, 616 S.W.2d 197, 202 (Tex.Cr.App. 1981); Alvarez v. State, 536 S.W.2d 357, 361 (Tex.Cr.App. 1976), cert. denied, 429 U.S. 924. Since we have already concluded that portions of the testimony of the deceased's mother were admissible, we also conclude that appellant's general objection failed to preserve for review the admissibility of those portions of the testimony which may have been erroneously admitted. Therefore, we overrule appellant's points of error three and five concerning the testimony of the deceased's mother.

Concerning appellant's point of error four pertaining to the admission of the photograph depicting the deceased smiling, the record reveals that the deceased's mother identified the deceased in the picture, stating, "That's my son. That's just what he looked like. He always had a smile." Appellant lodged no objection to this testimony and objected to the admission of the photograph on the grounds that it was "not relevant to any issue in this case whatsoever." Only on appeal, however, does appellant argue that the photograph constituted an attempt to inflame the jury.

We conclude that point of error four affords appellant no

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[6] The record reveals that while the deceased's mother testified, appellant lodged only two objections. One of these objections concerned the admission of a photograph of the deceased and the other objection concerned what the deceased's mother was doing when she sent the deceased on the errand to retrieve the boxes. After the deceased's mother concluded her testimony, appellant reurged his objections concerning the cumulative nature and prejudicial effect of the testimony.

grounds for relief. When the State tendered the photograph, appellant lodged only a relevance objection. This general objection failed to afford the trial judge an opportunity to weigh the probative value and prejudicial effect of the photograph and failed to preserve any such issue for review. Montgomery, 810 S.W.2d at 388. For this reason, we overrule appellant's point of error four.

In points of error one and two, appellant argues that the trial court erred in failing to instruct the jury at the punishment phase to consider all mitigating evidence that had been presented. Appellant argues that he presented evidence that he had an unstable home life due to his mother's relationships with many men, that one of these men was named Benny J. Smith who "physically assaulted Appellant from the time Appellant was eight until he was thirteen years old," that appellant's conduct worsened when Smith was living with appellant and his mother, that appellant's mother accidentally killed Smith, that appellant was a poor student, and that appellant could not read.[7] Appellant argues that this evidence went beyond the scope of the two special issues and required an instruction concerning the mitigating effect that such evidence could be given. In support of this position, appellant directs our attention to the case of Penry v. Lynaugh, 492 U.S. 302 (1989). The State argues that the evidence was not mitigating in nature and could be given its fullest effect according to the instructions actually given.

In points of error one and two, appellant asserts that the jury should have been instructed concerning the mitigating effect that such evidence may have regarding special issues one and two, respectively. At trial, however, appellant requested a mitigation instruction regarding only the first special issue.[8] This instruc-

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[7] The record reveals that only one witness testified that appellant was illiterate. Appellant objected to this testimony and the trial court instructed the jury to disregard it. Therefore, there was no evidence from which the jury could conclude that appellant could not read. For this reason, we will address no analysis to appellant's bare assertions, unsupported by the record, that he is illiterate.

[8] Appellant requested the following instruction:

(continued...)

tion, as set out in footnote eight, does not constitute a Penry instruction. That is thoroughly understandable, however, in light of the fact that this case was tried before the Supreme Court issued its opinion in Penry. On appeal, appellant basically argues that the jury should have been provided with a vehicle through which it could consider the evidence and express its reasoned moral response thereto. This Court has previously held that an issue regarding Penry evidence may be raised for the first time on appeal. See Selvage v. Collins, 816 S.W.2d 390, 392 (Tex.Cr.App. 1991)(In answering a certified question from the United States Court of Appeals for the Fifth Circuit, this Court decided that the petitioner's Penry claim was not procedurally barred by his failure to object at trial because the claim constituted an assertion of a right not recognized at the time of the trial). Therefore, we will address the issue of whether appellant was entitled to a Penry instruction regarding mitigating evidence.

We have interpreted Penry to mean that a capital sentencing scheme offends no federal constitutional provisions if the scheme both allows the jury to consider relevant mitigating evidence and provides the jury some means of expressing a reasoned moral response to that evidence in making an individualized assessment of punishment. Goss v. State, 826 S.W.2d 162, 165 (Tex.Cr.App. 1992). In analyzing a Penry-type claim, we look to see if the evidence presented at trial is specifically relevant to a defendant's "moral culpability," i.e. whether the evidence provides a basis for concluding that the defendant is less deserving of capital punishment. Id. at 165. If the relationship between the particular

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[8](...continued)

You are instructed that you may consider the the [sic] testimony of Esta [sic passim] Mae Jefferson [appellant's mother] regarding Warren Rivers's family history as relevant, if it is, to the issue of whether the conduct of the Defendant, Warren Darrell Rivers, that caused the death of [the deceased,] was committed deliberately and with the reasonable expectation that the death of [the deceased,] would result.

However, if you do not find the testimony of Esta Mae Jefferson regarding Warren Rivers [sic] family history relevant to the issue of 'deliberate' you may not consider Esta Mae Jefferson's testimony at all and will disregard it.

case's evidence and the special issues is such that the special issues provide no means for the jurors to respond in a morally reasoned way, the statute is unconstitutional as applied. Id. From this, a defendant is entitled to a Penry instruction only if the evidence is relevant to the case in a manner that is beyond the scope of the special issues. Id.

The capital punishment statute is not unconstitutional as applied to appellant's case. Appellant's evidence "is not of the same quality and character that the Supreme Court faced in Penry." Trevino v. State, 815 S.W.2d 592, 622 (Tex.Cr.App. 1991), overruled on other grounds, 112 S.Ct. 1547 (1992). While appellant claims that Benny J. Smith assaulted him from the time he was eight until he was thirteen, appellant's mother could testify that she knew of only three occasions when Smith assaulted the appellant. This evidence differs wholly from that of Johnny Paul Penry, who "was shown to have had a gruesome upbringing where as a youth he was beaten frequently resulting in a variety of learning and behavioral dysfunctions in his adult life." Id. Neither appellant's unstable childhood nor his difficult home life would require that a mitigation instruction be given. See Draughon v. State, 831 S.W.2d 331, 339 (Tex.Cr.App. 1992); Moody v. State, 827 S.W.2d 875, 896-897 (Tex.Cr.App. 1992). Finally, appellant's mediocre performance in school fails to mandate that the trial court instruct the jury regarding Penry-type mitigating evidence. Kelly v. State, 832 S.W.2d 44, 46 (Tex.Cr.App. 1992). As for the fact that appellant knew his mother had killed Benny J. Smith, we conclude that this evidence "is otherwise irrelevant to an individualized assessment of the deathworthiness of appellant." Lackey v. State, 819 S.W.2d 111, 134 (Tex.Cr.App. 1989). Therefore, we conclude that appellant was not entitled to a Penry instruction regarding mitigating evidence. The jury's assessment of all of appellant's relevant evidence could be expressed through the special issues. We overrule appellant's points of error one and two.

The judgment of the trial court is AFFIRMED.

PER CURIAM

DELIVERED APRIL 14, 1993.

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DO NOT PUBLISH.

CLINTON, J., dissents for reasons given in Part II of his dissenting opinion in Elliott v. State, No. 69,760, delivered this day.