# APPENDIX A

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

STATE OF TEXAS
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4/24/2024
**HEATH, CARY JOSEPH; AKA HEATH, CARY JOESPH** **Tr. Ct. No. C-213-W012406-1474853-B** **WR-95,024-02**

The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

3B-62D

CARY JOSEPH HEATH
MICHAEL UNIT - TDC # 2282518
2664 FM 2054
TENNESSEE COLONY, TX 75886

1 CIZVAAB 75886

# APPENDIX B

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

STATE OF TEXAS
PENALTY FOR
PRIVATE USE

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**10/4/2023**

**HEATH, CARY JOSEPH Tr. Ct. No. C-213-W012295-1474853-A WR-95,024-01**

This is to advise that the Court has denied without written order on the findings of the trial court and on the Court's independent review of the record.

Deana Williamson, Clerk

CARY JOSEPH HEATH
ALLRED UNIT - TDC # 2282518
2101 FM 369 NORTH
IOWA PARK, TX 76367

3136 28

IIZWAAB 76367

# APPENDIX C

CASE NO. 1474853D COUNT NO. ONE
INCIDENT NO./TRN: 9134282815

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 213TH DISTRICT COURT |
| v. | § | |
| CARY JOSEPH HEATH<br>AKA CARY JOESPH HEATH | § | TARRANT COUNTY, TEXAS |
| STATE ID NO.: TX12002635 | § | |

# JUDGMENT OF CONVICTION BY JURY

| | | | |
|---|---|---|---|
| Judge Presiding: | HON. CHRIS WOLFE | Date Sentence Imposed: | 9/12/2019 |
| Attorney for State: | SHAREN WILSON<br>CATHERINE SIMPSON<br>NICHOLAS L VINCENT | Attorney for Defendant: | GEORGE DEWAYNE HUSTON<br>JOHN STICKELS |

Offense for which Defendant Convicted:
CAPITAL MURDER - MULTIPLE

| | |
|---|---|
| Charging Instrument:<br>Indictment | Statute for Offense:<br>19.03(A)(7) PC |
| Date of Offense:<br>10/23/2016 | Plea to Offense:<br>NOT GUILTY |
| Degree of Offense:<br>CAPITAL FELONY | |
| Verdict of Jury:<br>Guilty | Findings on Deadly Weapon:<br>N/A |
| 1st Enhancement Paragraph:<br>N/A | Finding on 1st Enhancement Paragraph:<br>N/A |
| 2nd Enhancement Paragraph:<br>N/A | Finding on 2nd Enhancement Paragraph:<br>N/A |
| Punishment Assessed by:<br>Jury | Date Sentence Commences: (Date does not apply to confinement served as a condition of community supervision)<br>9/12/2019 |

Punishment and Place of Confinement: LIFE Institutional Division, TDCJ

THIS SENTENCE SHALL RUN N/A.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A.
(The document setting forth the conditions of community supervision is incorporated herein by this reference.)

☐ Defendant is required to register as sex offender in accordance with Chapter 62, CCP.

(For sex offender registration purposes only) The age of the victim at the time of the offense was N/A

| Fine: | Court Costs: | Restitution: | Restitution Payable to: |
|---|---|---|---|
| N/A | $319.00 | N/A | (See special finding or order of restitution which is incorporated herein by this reference.) |

Was the victim impact statement returned to the attorney representing the State? N/A

(FOR STATE JAIL FELONY OFFENSES ONLY) Is Defendant presumptively entitled to diligent participation credit in accordance with Article 42A.559, Tex. Code Crim. Proc.? N/A

Total Jail Time Credit: 1054 Days

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.
N/A Days Notes: N/A

This cause was called for trial by jury and the parties appeared. The State appeared by her District Attorney as named above.

## ORDER

The State's Motion is hereby granted/denied on this the 13th day of September, 2019. It is further ordered that the jury list be destroyed after the jurors have been notified and further that the State shall not maintain any juror information regarding their addresses.

JUDGE PRESIDING

# APPENDIX D

Opinion issued September 9, 2021

In The

**Court of Appeals**

For The

**First District of Texas**

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NO. 01-19-00794-CR

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**CARY JOSEPH HEATH A/K/A CARY JOESPH HEATH, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 213th District Court[1]**
**Tarrant County, Texas**
**Trial Court Case No. 1474853D**

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1 Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal from the Court of Appeals for the Second District of Texas to this Court. *See* Misc. Docket No. 19-9091, Transfer of Cases from Courts of Appeals (Tex. Oct. 1, 2019); *see also* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases). We are unaware of any conflict between precedent of that court and that of this court on any relevant issue. *See* TEX. R. APP. P. 41.3.

## MEMORANDUM OPINION

Cary Joseph Heath appeals his capital murder conviction for shooting and killing two men outside a residence. *See* TEX. PENAL CODE § 19.03(a)(7). He was sentenced to life imprisonment. In four issues, he argues that the trial court should have instructed the jury on a lesser-included offense and that the trial court erred by admitting certain evidence. We affirm.

### Background

Daniel Haros and Phillip Evans were best friends since high school. At the time of the incident, they were in their mid-twenties, and Evans lived with the Haros family. The two men worked the same shift at a factory and were so close that people thought they were brothers. In the early hours of October 23, 2016, after spending time at several bars, Haros and Evans and two friends returned to their home in Fort Worth. The group noticed a party taking place at a house down the street, and they walked over to greet their neighbors. The party was a Halloween party at Andres and Rachel Licea's house. Heath and his wife lived next door to the Liceas and attended the party. When Haros, Evans, and two of their friends stopped by, the party was nearly over. They encountered the Liceas, Heath and his wife, and another couple outside the Liceas's home. The two groups introduced themselves and had a quick, congenial conversation. Andres Licea informed the complainants that the party was over. Haros and Evans and their friends went home. The friends then got in a car and left. As he left, one of the friends saw someone walking across the grass toward where Haros and Evans lived.

The Liceas and Heath's wife went back inside the Liceas's house. Heath stayed outside. A short time later, Andres Licea heard several gunshots. He immediately assumed Heath was shooting guns because he knew Heath had several firearms in a safe in his garage. Soon after, Heath came running into the Liceas's house holding his infant child. He handed the baby to his wife and told her it was the last time he would see the baby and that he had just killed two people. The baby had blood on him but was not injured. Heath's wife gave Rachel Licea the baby and followed Heath. When she returned a few minutes later, she was hysterical and said, "There's bodies on the floor." She took the baby and left.

Kassandra Haros, the complainant's sister, heard Haros and Evans come home in the early morning hours of October 23, 2016. At first, they each went to their respective bedrooms. Kassandra then heard Evans, whose bedroom is at the front of the house, go to Haros's room. She heard the men go out the front door and heard it close. Kassandra then heard several gunshots in front of her house. She opened the front door and saw a man standing over someone. The man was hitting the person on the ground with the butt of a rifle. She yelled out to the man to stop and he responded, "What? Do you have a problem? They were in my yard." Kassandra called 911. At trial, she identified Heath as the man she saw standing in her yard with the rifle.

When law enforcement arrived, they found Haros and Evans brutally beaten and shot outside their home. Law enforcement believed it could be an active shooter situation, and the crime scene was secured. Paramedics recovered the bodies in the dark, with police protection, and transported them to a staging area at a church a few blocks away. The bodies remained in an ambulance at the staging area as a secondary crime scene. The paramedic described the complainants' injuries as some of the worst he had seen in his career. Haros and Evans were declared dead at the scene. They had multiple gunshot wounds from the torso to the head and blunt force trauma to their faces.

At first, law enforcement arrested the Haros's next door neighbor. Kassandra had never met her neighbor, but as soon as she saw him, she advised police that he was not the man she had seen with the rifle. The neighbor cooperated with police and consented to searches of his house, car, and clothing. The search revealed no evidence. Law enforcement eliminated him as a suspect because it would not have been possible to cause significant damage to the complainants and not leave a trace of evidence in one's house.

On May 7, 2017, a father and son were fishing on Lake Whitney in Hill County. They found an assault rifle in the lake. The Hill County Sheriff's Office took custody of the Sig Sauer AR-15 .223 rifle. Using the serial number, Heath was identified as the owner of the gun, and the Hill County Sheriff's Office was advised that law enforcement suspected that the rifle had been used in a homicide. Fort Worth police detectives collected the firearm.

During law enforcement's investigation, Heath's wife provided information that Heath had disposed of a rifle and clothing in Lake Whitney. She also admitted that she was involved in tampering with and concealing evidence. Andres and Rachel Licea told law enforcement that they believed that Heath was the shooter. The detective testified that both Evans and Haros were killed during the same criminal transaction.

In addition to testimony giving these facts, the jury heard testimony that Heath's cell phone traveled from Fort Worth to Hill County on the day after the shooting. The phone was in Hill County for approximately four hours before traveling north to the Fort Worth area.

A firearm and toolmark examiner reviewed cartridge casings collected from the crime scene and autopsies to determine whether they were fired from the rifle recovered from Lake Whitney. Of the 20 cartridge casings examined, 17 had unique firing marks sufficient to determine that they had been fired from the rifle. The state of the remaining three casings made it difficult to identify unique marks necessary to determine whether they were fired from a specific firearm. Of the nine envelopes of fragments removed during the autopsy of Haros, seven contained fragments that had been fired through the barrel of the rifle recovered from Lake Whitney.[2] The examiner testified that serial numbers on Sig AR-15 .223 rifles are on the lower receiver, which is removable, making it possible that the rifle he examined had a different barrel and serial number on it when the cartridges had been fired. The examiner also determined that a .223 round magazine recovered from Heath's bedroom was the same type of ammunition as the fired casings and unfired cartridges recovered from the scene. Additional ammunition found in Heath's gun safe in his garage was also the same caliber ammunition that could be fired from the rifle.

Several items recovered from Heath's house were tested for blood and DNA. Swabs from the .223 round magazine found in his bedroom tested presumptively positive for blood and had a mixture of the two complainants' DNA on it. Blood and the complainants' DNA were also found on Heath's gun safe, including the left side of the door, the bottom of the safe, and the handle of the safe. Authorities found the complainants' DNA on another gun in the safe and on a Texas Rangers baseball cap matching the one Heath wore on the night of the offense. A forensic scientist testified that cross contamination could occur at crime scenes and labs, however there was no known cross contamination in this case.

2 No fragments were recovered during Evans's autopsy.

The doctor who performed autopsies on both complainants testified that he classified both deaths as homicides. The cause of death for Haros was multiple high-velocity gunshot wounds to the head and chest. The cause of death for Evans was a high-velocity gunshot wound to the neck and blunt force trauma to the face and head.

After deliberating, the jury found Heath guilty of capital murder, and he was sentenced to life imprisonment. He appeals.

## Jury Instruction

At trial, Heath objected to the court's proposed charge because it did not include an instruction on the lesser-included offense of murder. He submitted proposed language for the charge, and the trial court denied his request. On appeal, Heath contends that the trial court should have instructed the jury on the lesser-included offense of murder. The State responds that Heath was not entitled to a lesser-included instruction because the evidence was not sufficient to establish that Heath committed murder, as a rational alternative to capital murder. We agree.

### A. Standard of Review and Applicable Law

In reviewing a jury charge, we first determine whether the instruction is erroneous. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If error occurred, then the appellate court must analyze that error for harm. *Id.*

Heath contends that the charge was erroneous because it did not include an instruction on a lesser-included offense. Courts apply a two-step analysis when determining whether a trial court should have granted a request for an instruction on a lesser-included offense. *Young v. State*, 428 S.W.3d 172, 175 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007)). First, they determine whether the requested offense is a lesser-included offense by comparing the elements of the two offenses. *Young*, 428 S.W.3d at 175. If the requested offense is a lesser-included offense of the charged offense, the court determines whether any evidence adduced at trial would support instructing the jury on the lesser included offense. *Id.* at 176. The evidence must support the lesser-included offense as a "valid, rational alternative to the charged offense." *Hall*, 225 S.W.3d at 536

**B. Analysis**

It is well established that murder is a lesser-included offense of capital murder. *See McKinney v. State*, 207 S.W.3d 366, 370 (Tex. Crim. App. 2006). The issue is whether there is some evidence that would permit a rational jury to find that Heath is guilty only of a lesser offense, and not of the greater offense. *Moore v. State*, 969 S.W.2d 4, 8, (Tex. Crim. App. 1998). The evidence adduced at trial must support a conviction for murder, as a "valid, rational alternative" to capital murder. *Hall*, 225 S.W.3d at 536. To prove that Heath committed capital murder as charged in the indictment, the State was required to establish that Heath murdered more than one person during the same criminal transaction. *See* TEX. PENAL CODE § 19.03(a)(7).

On appeal, Heath contends that the jury should have been instructed on the lesser-included offense of murder because the jury could have found him guilty of murdering only one of the complainants. After reviewing the record, we conclude that the only valid, rational conclusion from the evidence is that a single individual murdered both Evans and Haros. The perpetrator spoke of attacking at least two individuals when he told Kassandra, "*They* were in my yard." (emphasis added). Both Evans and Haros were found on the ground outside their home when first responders arrived. The record reflects that first responders arrived minutes after Kassandra called 911. While the firearms examiner was unable to match some of the fired cartridges to the recovered rifle, he did not suggest that the unidentified cartridges were fired from a different firearm.

The evidence does not suggest that Heath murdered only one of the complainants. Both Evans's DNA and Haros's DNA was found on Heath's gun safe, clothing, and on a magazine in his bedroom. Heath also confessed to the Liceas and his wife that he shot two people. The only logical conclusion from the evidence is that Heath either murdered both men or that he murdered neither man. There is no evidence that would allow the jury to acquit Heath of capital murder yet find him guilty of murder. *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012) (second prong of analysis requires "affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense").

Therefore, Heath was not entitled to the requested lesser-included offense instruction. *See Ritcherson v. State*, 568 S.W.3d 667, 678 (Tex. Crim. App. 2018) (finding appellant not entitled to lesser-included instruction when no reasonable interpretation of evidence would allow jury to find appellant guilty of only the lesser-included offense). We overrule Heath's first issue.

**Admission of Cell Phone Extraction Report**

In his second issue, Heath argues that the trial court committed reversible error by admitting State's Exhibit 202, which is an extraction report from Heath's cell phone. He argues that the search warrant used to obtain the report was insufficient to establish probable cause to search his cell phone, in violation of his rights under the U.S. and Texas Constitutions. The State responds that even assuming the trial court erroneously admitted the exhibit, the error does not require reversal because it had little, or no, effect on Heath's conviction. We agree.

**A. Standard of Review**

Because the alleged error in admitting the evidence impinged on Heath's constitutional rights, Texas Rule of Appellate Procedure 44.2(a) applies. *See* TEX. R. APP. P. 44.2(a). Texas Rule of Appellate Procedure 44.2(a) requires reversal in constitutional error cases "unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a). In applying the test, "we we ask whether there is a 'reasonable possibility' that the error might have contributed to the conviction." *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2016). Our analysis does not focus on the propriety of the trial's outcome; instead, we calculate as much as possible the probable impact on the jury in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). We consider such things as the nature of the error, the extent to which it was emphasized by the State, its probable collateral implications, and the weight a juror would probably place on the error. *See Snowden v. State*, 353 S.W.3d 815, 821–22 (Tex. Crim. App. 2011). The reviewing court "should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction. . . .'" *Id.* at 822 (quoting TEX. R. APP. P. 44.2(a)). The reviewing court should evaluate the entire record in a neutral, impartial manner. *Kane v. State*, 173 S.W.3d 589, 594 (Tex. App.—Fort Worth 2005, no pet.).

**B. Analysis**

Even if the exhibit was obtained in violation of the search warrant, any error in admitting it was harmless. Following Heath's arrest, law enforcement obtained a search warrant for Heath's cell phone. Based on the warrant, a detective performed cell phone extraction and examination of the cell phone and generated a report. During trial, the detective testified regarding his extraction process, and the State offered the cell phone examination results into evidence as State's Exhibit 202. Heath objected, arguing that the search warrant was insufficient to establish probable cause to search the contents of the cell phone in violation of the Texas and United States constitutions. *See* U.S. CONST. amend IV.; TEX. CONST. art. I, § 9. The trial court overruled the objection and admitted the report. The report contained the data stored on the phone, but did not report the phone's historical location. The State did not review the report with the detective, nor was any of the content extracted from the phone, such as emails, contacts, or text messages, admitted into evidence.

Heath argues that State's Exhibit 202, containing the cell phone examination results, was critical evidence because the data was used to show the location of his phone after the shooting. Heath contends that the State used law enforcement testimony about the data to suggest that Heath had traveled toward the location where the rifle was recovered. The State responds that the location records for the phone were obtained pursuant to a separate, valid, search warrant and that the records were admitted on their own without objection. We agree.

The jury heard testimony regarding the location of Heath's cell phone, but the testimony was not based on the evidence in question. A law enforcement agent testified that on the day after the shooting, Heath's cell phone traveled from Fort Worth to Hill County, where it remained for about four hours before returning to Fort Worth. The agent did not use the cell phone examination results that Heath complains about to determine the phone's location. Instead, he testified that he relied on records obtained from AT&T to ascertain Heath's cell phone's historical location. The AT&T location records were obtained through a separate, independent search warrant and admitted without objection as a separate exhibit.

The State did not emphasize the complained-of information from Heath's cell phone. The detective testified that the phone was not locked, that he browsed it to determine if it was set to update automatically and noted it had an email address associated with it. He then extracted its contents. Other than asking the detective how he extracted data from the phone and if the exhibit contained the report generated from the cell phone, the State did not ask any questions about the report. The State also did not introduce evidence obtained from the search, such as texts or contact numbers. The examination results were not a critical piece of evidence connecting Heath to the location of the murder.

The evidence of Heath's guilt was overwhelming. The record reflects that on the night of the offense, Heath, his wife, and the Liceas encountered the two complainants and their friends. They had a polite interaction and then the group dispersed. Heath's wife and the Liceas went inside the Liceas's house. Heath stayed outside. The complainants returned to their house, and their friends went home. While the friends were driving away, they saw someone walking across the grass toward the complainants' house.

Shortly after, Kassandra Haros heard Evans get her brother out of his room. She heard the two men go outside, and then she heard several gunshots outside. When she opened the front door, she saw a man standing in her yard over someone in the grass, hitting the person with the butt of a rifle. She believed the man in the grass was Haros. She yelled to the man to stop and he replied, "What? Do you have a problem? They were in my yard." Kassandra called 911 and described the suspect. Law enforcement reported to the crime scene quickly. First responders found two complainants on the ground, one in the yard and one on a neighbor's driveway.

Meanwhile, Andres Licea, who lived approximately three houses down from Haros and Evans, also heard the gunshots. He immediately thought that Heath was shooting guns. Heath then came back inside the Liceas's house carrying his infant son. He seemed panicked as he gave the baby to his wife and said, "This is my last time I'm seeing my baby. I just killed two people." The baby had blood on him but was not injured. Heath's wife gave Rachel Licea the baby and followed her husband. A few minutes later, Heath's wife returned. She was hysterical and told the Liceas that there were "bodies on the floor." She took the baby and left.

According to records obtained from AT&T, the next day Heath's cell phone traveled from Fort Worth to Hill County, where it remained for about four hours before returning to Fort Worth. Seven months later, a father and son found an assault rifle in Lake Whitney in Hill County. Ultimately, law enforcement used the serial number on the rifle to identify Heath as its owner and determine that the gun was potentially used in a homicide.

A firearm examiner with the Fort Worth Police Department Crime Lab examined the cartridges collected from the crime scene and the autopsies to determine if the cartridges were fired from the rifle recovered at Lake Whitney. Of the twenty cartridges he examined, seventeen had unique firing marks sufficient to determine that they were fired from the rifle. The remaining three could not be determined. The firearm examiner also studied nine envelopes of fragments removed during Haros's autopsy. Of those, seven contained fragments fired from the barrel of the rifle recovered at Lake Whitney. The same type of ammunition was also recovered from Heath's gun safe in his garage and from his bedroom.

Detectives recovered blood and DNA from several items in Heath's home. The complainants' DNA was found in Heath's bedroom, gun safe, and the butt of a gun found in the safe. Their DNA was also found on a hat matching the one Heath wore on the night of the offense. The scientist who studied the samples testified that while cross contamination can occur across crime scenes and labs, there were no indications of cross contamination in this case.

A police detective testified that initially another suspect was taken into custody. That suspect was a neighbor that Kassandra Haros had never met. As soon as Kassandra saw that neighbor, she advised law enforcement that he was not the man she had seen with the rifle. The man cooperated with the police, and a search of his home and belongings did not reveal any evidence. The detective testified that he eliminated the man as a suspect because it would not have been possible to brutally murder two people and not leave a trace of evidence in one's house.

The detective learned from Heath's wife that Heath had disposed of a rifle and clothing in Lake Whitney and that she was involved in tampering with and concealing evidence. Finally, both Andres and Rachel Licea confirmed to the detective that Heath was the shooter. The detective also testified that Evans and Haros were killed during the same criminal incident.

Throughout this testimony, the cell phone data report was not discussed or used in any meaningful way. The State did not ask other witnesses about contacts, text messages, or other information stored on Heath's cell phone. The effect of the erroneous admission of the cell phone examination results was minimal. The evidence did not contribute to Heath's conviction. After reviewing the record, we conclude that any error in admitting the report was harmless. We overrule Heath's second issue.

**Admission of Photographs**

Heath contends that the trial court erred by admitting photographs of the complainants in the ambulance immediately after paramedics removed them from the original crime scene. He argues that the photographs were substantially more prejudicial than probative. The State responds that the trial court did not abuse its discretion in admitting them. We agree with the State.

### A. Standard of Review

The trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or the needless presentation of cumulative evidence. TEX. R. EVID. 403; *see Gigliobianco v. State*, 210 S.W.3d 637, 640 (Tex. Crim. App. 2006) ("The issue is whether the search for the truth will be helped or hindered by the interjection of distracting, confusing, or emotionally charged evidence."). All evidence against a defendant, by its very nature, is prejudicial, but only unfairly prejudicial evidence may be excluded. *See Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013). The admissibility of a photograph rests within the trial court's sound discretion based on a determination about whether the exhibit serves a proper purpose in assisting the finder of fact. *Ramirez v. State*, 815 S.W.2d 636, 646–47 (Tex. Crim. App. 1991). Generally, photographs are admissible if verbal testimony as to matters depicted in the photographs is also admissible. *Id.* at 647. An abuse of discretion occurs "when the probative value of the photograph is small and its inflammatory potential great." *Id.*

When conducting a Rule 403 analysis, a court must balance the probative force of and the proponent's need for the evidence against (1) any tendency of the evidence to suggest a decision on an improper basis; (2) any tendency of the evidence to confuse or distract the jury from the main issues; (3) 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 (4) the likelihood that presentation of the evidence will amount to undue delay. *Gigliobianco*, 210 S.W.3d at 641–42. In the context of admission of photographs, courts also consider "the number of photographs, the size, whether they are in color or are black and white, whether they are gruesome, whether any bodies are clothed or naked, and whether a body depicted in the photograph has been altered by autopsy." *Erazo v. State*, 144 S.W.3d 487, 489 (Tex. Crim. App. 2004).

**B. Analysis**

The trial court did not abuse its discretion in admitting the photographs. During the paramedic's testimony, the State offered into evidence photographs of the complainants in an ambulance as State's Exhibits 10 through 26. The photographs were taken immediately after paramedics removed the two men from the original crime scene. One photo depicted the church where paramedics parked the ambulance after recovering the bodies. The remaining photographs showed the complainants' injuries from gunshots and blunt force trauma. Heath objected to the admission of the photographs based on Rule 403, arguing that undue prejudice substantially outweighed their probative value. *See* TEX. R. EVID. 403. The trial court overruled the objection. The State published nine of the photographs, and the paramedic described each one. The State did not publish or discuss the remaining six photographs, though they were admitted into evidence and available to the jury.

The paramedic used the photographs as demonstrative aids while testifying about the complainants' injuries. The injuries were some of the most serious the paramedic had seen in his career. The paramedic testified that Evans and Haros had multiple gunshot wounds to the torso, abdomen, and head. The scene was considered an active shooter situation, so the paramedic had to recover the bodies in the dark with law enforcement protection and move them to the ambulance. He could not see the complainants' injuries until the bodies were in the ambulance. The pictures demonstrated that Evans and Haros suffered from multiple gunshot wounds to the torso, neck, and head and blunt force trauma.

The photographs were probative to show the extent of the injuries Heath inflicted on the complainants and the state of the bodies when paramedics encountered them. *See Gallo v. State*, 239 S.W.3d 757, 763 (Tex. Crim. App. 2007). The State presented the evidence concisely, one photograph at a time, while the paramedic provided a short description of each photograph. For the sake of time, the State only published nine of the photos and reminded the jury that the other photographs were available if the jury wished to view them. This testimony is four pages out of three volumes of trial testimony.

The complained-of photographs were in color, a mix of close up and more distant images, and the complainants were both fully clothed in the photographs. While the photographs were gruesome, they depicted the reality of the brutal crime that had occurred. They showed the injuries inflicted upon Evans and Haros that paramedics observed. *See Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999) (photographs of complainant's wounds were gruesome, but not unduly prejudicial where they depicted reality of crime scene).

Heath argues that the images do not merely depict the gruesomeness of the crime because the photographs were taken in the ambulance, not where the offense occurred. But the paramedic testified that due to the active shooter situation, he was unable to attend to Evans and Haros on site. Instead, paramedics, with the assistance of police patrol, moved the complainants so that they could treat them safely. The jury also heard testimony from a detective that the ambulance was preserved as a crime scene until law enforcement officers arrived. The photographs did not encourage the jury to resolve material issues on an improper basis. *Cf. Reese v. State*, 33 S.W.3d 238, 239 (Tex. Crim. App. 2000) (holding photo of victim and her deceased unborn baby laying in coffin together unduly prejudicial); *Potter v. State*, 74 S.W.3d 105, 113 (Tex. App.—Waco 2002, no pet.) (holding photo of victim's head, taken at morgue and showing injuries from attempted tracheotomy, unduly prejudicial). The photographs were not taken in such a way that would cause the jury to be confused or distract from the main issues of the case.

The photographs were highly probative to show the extent of the injuries Heath inflicted on the complainants and to exclude the neighbor as a suspect. This probative value was not substantially outweighed by a danger of unfair prejudice. The trial court did not abuse its discretion in admitting them. We overrule Heath's third issue.

### Admissibility of Rifle

In his fourth issue, Heath contends that the trial court abused its discretion by admitting the rifle into evidence because it was not properly authenticated. We disagree.

#### A. Standard of Review

We review a trial court's decision to admit evidence over an authentication objection for an abuse of discretion. *De la Luz Torres v. State*, 570 S.W.3d 874, 878 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd). The trial court's ruling must be within at least the zone of reasonable disagreement.

Texas Rule of Evidence 901(a) provides that the requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. TEX. R. EVID. 901(a). This rule "does not require the State to *prove* anything." *Garner v. State*, 939 S.W.2d 802, 805 (Tex.

App.—Fort Worth 1997, pet. ref'd) (emphasis in original). Instead, "the rule 'requires only a showing that satisfies the trial court that the matter in question is what the State claims.'" *Haq v. State*, 445 S.W.3d 330, 336 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (quoting *Garner*, 939 S.W.2d at 805). "[O]nce the showing is made, the exhibit is admissible." *Id.* Evidence may be authenticated or identified by different methods, including testimony from a witness with knowledge that the item is what it is claimed to be. TEX. R. EVID. 901(b)(1). Items "that are easily identifiable and substantially unchanged normally do not require the introduction of a chain of custody." *Haq*, 445 S.W.3d at 336. "If the item has distinct or unique characteristics, a witness may authenticate it by testifying that he or she has previously seen the item at the relevant time and place and that the witness recognizes it by its distinctive characteristics." *Id.*

**B. Analysis**

State's exhibit 292, an AR-15 rifle, was admitted during the testimony of the deputy who recovered it in Hill County. The deputy testified that in May 2017, he received a call that a father and son had found a rifle while fishing. The deputy retrieved the rifle and identified it as a Sig AR-15 .223 rifle. He tagged the item into evidence and noted its serial number in his offense report. He noted that it was corroded from being in the lake. He testified at trial that he recognized State's Exhibit 292 as the same Sig AR-15 .223 rifle he retrieved in May 2017 because the serial number on the exhibit matched the serial number of the rifle he tagged into evidence. After Heath objected, the trial court permitted Heath to take the witness on voir dire. On voir dire, the deputy elaborated that he retrieved the rifle from the father and son who found it, placed it in his vehicle, transported it to the Hill County Sheriff's Office, completed his report regarding the rifle, and tagged the firearm for evidence. He placed the rifle into the evidence locker at the Hill County Sheriff's Office. The trial court then asked the deputy how he knew State's Exhibit 292 was the same gun he retrieved and tagged into evidence. The deputy responded that the serial number on the exhibit was the same as the serial number on the firearm that he logged into evidence. In response to the trial court's inquiry about the condition of the exhibit, the deputy testified that the exhibit had been cleaned up to make it safe but looked similar to the rifle he tagged into evidence.

In objecting to the admission of the gun, Heath argued that the State's predicate was improperly based on the firearm's serial number, rather than the evidence tag number, and that the State did not account for the whereabouts of the rifle between the time it was placed in the evidence locker in Hill County and the moment it was presented in court. The deputy testified that he knew the rifle was the one he recovered because it had the same serial number. "A witness may authenticate an item with unique characteristics by testifying that he has previously seen the item at the relevant time and place and that the witness recognizes it by its distinctive characteristics." *Haq*, 445 S.W.3d at 336; *see Starling v. State*, No. 02-11-00349-CR, 2013 WL 826613, at *2–3 (Tex. App.—Fort Worth Mar. 7, 2013, no pet.) (mem. op., not designated for publication) (citing *Mendoza v. State*, 69 S.W.3d 628, 631 (Tex. App.—Corpus Christi 2002, pet. ref'd)) (upholding admission of pieces of a firearm based on distinctive characteristics). The serial number was a unique characteristic that made the rifle easily identifiable. The deputy testified that the rifle was in similar condition to when he recovered it, albeit cleaned for safety. This testimony was sufficient for the trial court to determine that State's Exhibit 292 was what the State purported it to be.

The deputy's testimony identifying the rifle and its distinctive characteristics properly authenticated it for admission. *See* TEX. R. EVID. 901(b)(1). Any concerns related to the storage of the firearm between its recovery and trial go to the weight of the evidence, not its admissibility. *See Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997) (any gaps or breaches in chain of custody go to the weight rather than admissibility of evidence, absent a showing of tampering). The trial court did not abuse its discretion in admitting State's Exhibit 292. We overrule Heath's fourth issue.

**Conclusion**

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).

# APPENDIX E

**12/8/2021** **COA No. 01-19-00794-CR**
**HEATH, CARY JOSEPH A/K/A CARY JOESPH HEATH** **Tr. Ct. No. 1474853D**
**PD-0786-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

ADAM ARRINGTON
610 E. WEATHERFORD ST.
FORTH WORTH, TX 76102
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1ST COURT OF APPEALS CLERK
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# Appendix

# F

(B) tdc01idr - PASSPORT Thursday, May 16, 2024, 11:56:41 AM

CSINIB02/CINIB02 TEXAS DEPARTMENT OF CRIMINAL JUSTICE 05/16/24
1IDR/BA00185 IN-FORMA-PAUPERIS DATA 11:56:34
TDCJ#: 02282518 SID#: 12002635 LOCATION: MICHAEL INDIGENT DTE: 05/13/24
NAME: HEATH,CARY JOSPEH BEGINNING PERIOD: 11/01/23
PREVIOUS TDCJ NUMBERS:
CURRENT BAL: 0.00 TOT HOLD AMT: 0.00 3MTH TOT DEP: 0.00
6MTH DEP: 197.00 6MTH AVG BAL: 110.08 6MTH AVG DEP: 32.83

| MONTH | HIGHEST BALANCE | TOTAL DEPOSITS | MONTH | HIGHEST BALANCE | TOTAL DEPOSITS |
|---|---|---|---|---|---|
| 04/24 | 57.58 | 0.00 | 01/24 | 151.88 | 50.00 |
| 03/24 | 110.73 | 0.00 | 12/23 | 151.58 | 47.00 |
| 02/24 | 151.88 | 0.00 | 11/23 | 163.44 | 100.00 |

STATE OF TEXAS COUNTY OF Anderson
ON THIS THE 16th DAY OF May 2024 I CERTIFY THAT THIS DOCUMENT IS A TRUE, COMPLETE, AND UNALTERED COPY MADE BY ME OF INFORMATION CONTAINED IN THE COMPUTER DATABASE REGARDING THE OFFENDER'S ACCOUNT. NP SIG: Andreya Bagley
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ANDREYA BAGLEY
Notary Public, State of Texas
Comm. Expires 04-15-26
Notary ID 133086359 NOTARY WITHOUT BOND