FILE COPY

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

[SEAL]

4/14/2021

Tr. Ct. No. 1353181-A

UVUKANSI, FEANYICHI EZEKWESI WR-88,493-02

This is to advise that the Court has denied without written order the application for writ of habeas corpus. JUDGE KEEL DID NOT PARTICIPATE.

Deana Williamson, Clerk

RANDY SCHAFFER
ATTORNEY AT LAW
1021 MAIN ST. #1440
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

No. 1353181-A

EX PARTE	§	IN THE 174th DISTRICT COURT
FEANYICHI EZEKWESI UVUKANSI, Applicant	§	OF HARRIS COUNTY, TEXAS

COURT'S PARTIAL ADOPTION OF STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Apr. 2, 2019)

The Court enters the following the following Findings of Fact and Conclusion of Law, and recommends to the Court of Criminal Appeals that habeas corpus relief should be DENIED. The Court has considered the following:

1. The reporter's and clerk's record in cause no. 1353181, the *State of Texas vs. Feanyichi Ezekwesi Uvukansi*;

2. The applicant's writ of habeas corpus and all associated exhibits in cause no. 1353181-A, *Ex parte Feanyichi Ezekwesi Uvukansi*;

3. The testimony and exhibits presented at the writ evidentiary hearing conducted on August 6, 2018;

4. All of the documents and motions presented by the State of Texas for *in camera* inspection in response to the applicant's motions for discovery in the instant habeas application;

5. The Court of Appeals decision affirming the applicant's conviction, *Uvukansi v. State,* NO. 01-14-00527-CR, 2016 WL 3162166 (Tex. App. - Houston [1st Dist.] 2016. pet. ref'd) (not designated for publication); and,

6. The arguments of counsel.

PROCEDURAL HISTORY

1. The Stat charged the applicant Feanyichi Ezekwesi Uvukansi by indictment with the felony offense capital murder for murdering two people during the same criminal transaction, namely Coy Thompson and Carlos Dorsey (C.R. at 27).[1] A jury found the applicant guilty as charged in the indictment on June 20, 2014 (C.R. at 1091). As required by statute, the trial court sentenced the applicant to lifetime confinement in the Texas Department of Criminal Justice—Correctional Institutions Division without the possibility of parole (C.R. at 1,092). TEX. PENAL CODE ANN. §12.31(a)(2) (West Supp. 2014).

2. The Firs Court of Appeals affirmed the applicant's conviction. *Uvukansi v. State,* NO. 01-14-00527-CR, 2016 WL 3162166 (Tex. App. - Houston [1st Dist.] 2016. pet. ref'd) (not designated for publication).

---

[1] The following abbreviations will be used throughout: "C.R." stands for the clerk's record in the applicant's jury trial; "R.R. stands for the reporter's record in the applicant's jury trial; and, "W.R." stands for the reporter's record in the writ evidentiary hearing.

3. The applicant was represented at trial by attorneys Vivian King, Matthew Brown, JaPaula Kemp, and Darren Sankey; the State was represented by Assistant District Attorneys Gretchen Flader and Kyle Watkins.

4. The trial was presided over by Hon. Frank Price.

SUMMARY OF THE TRIAL EVIDENCE

STATE'S EVIDENCE AT GUILT-INNOCENCE

5. Oscar Jeresano worked as a valet in the parking lot for the Room Night club on June 20, 2012, while the club next door, Hottie's hosted a rap concern (VIII R.R. at 5-6). The performance included rapper Trae-Tha-Truth, whose given name was Frazier Thompson (VII R.R. at 27-28)(VIII R.R. at 7). After the performance concluded round 2:00 or 2:10 a.m., and as Thompson walked toward the valet stand to get his car, he heard gunshots and felt a bullet strike him (VII R.R. at 29, 34-35, 36)(VIII R.R. at 14). He sustained a gunshot wound to his back, but he did not see who shot him (VII R.R. at 35). He fell to the sidewalk when someone grabbed him and rushed him to the hospital (VII R.R.

6. Jeresano saw Thompson leave the club and a number of people stood around him, but the area was very crowded with roughly 100 or more people lingering to see Thompson or to get their cars from the valets. (VIII R.R. at 15-16). As Mr. Jeresano spoke to a woman about retrieving her car, he heard the shots, but he initially thought they were only from a BB gun until he saw the flames come

from the gun (VIII R.R. at 17-19). He turned and found himself staring at the shooter (VIII R.R. at 19-21). He froze while staring at the shooter for about five to six seconds, and he saw almost a full frontal or at least 85% view of the man's face (VIII R.R. at 20-23). As he stared, he focused on the man's face, and he had plenty of light in which to see it based on the parking lot lighting (VIII R.R. at 23-24). He noticed that the shooter had a determined look on his face and seemed to "kn[o]w what he was going for . . . It wasn't a random thing. The look on his face that was what attracted [Jeresano] . . . what kept [him] staring" (VIII R.R. at 24). He saw the shooter moving, kind of jumping as though trying to get to his car (VIII R.R. at 26). He described the shooter with a "fade" haircut, he wore all black, and he was about Mr. Jeresano's size (VIII R.R. at 71-73)

7. After the five to six seconds, Mr. Jeresano dodged behind a nearby car, but he could see beneath the car to where the bodies fell, and he saw people running around or attempting to attend to those shot (VIII R.R. at 27-29). He heard roughly 15 shots, and he thought from the noises that there was only one shooter (VIII R.R. at 29-30). The shots came one after the other without a pause (VIII R.R. at 61). Although he could not say definitively who shot the men and woman killed, he saw the applicant shoot at the crowd toward the area where the victims fell (VIII RR. at 100-02). Carolos Dorsey, Erica Dotson, and Coy 'Thompson died from the gunshot wounds they sustained (XI R.R. at 54-82). *State's Exhibit Nos. 60, 66, 79.*

8. When police arrived, Jeresano did not immediately volunteer what he had seen (VIII R.R. at 32). He faced his own charges in federal court, he felt fearful of speaking with police before first talking to his attorney, and he assumed police were unlikely to believe him because of his legal situation (VIII R.R. at 32). Afterward, he contacted his attorney Brent Wasserstein who arranged for Jeresano to speak to police at his office. (VIII R.R. at 33-35). Jeresano received nothing in exchange for his testimony, and he had already pled guilty to his case and was awaiting sentencing when he testified (VIII R.R. at 35). When he met with police, no one offered him any sort of a reduction in his sentencing range (VIII R.R. at 35).

9. Police showed Jeresano a group of photographs, and from them he identified the applicant as the man he saw firing into the crowd (VIII R.R. at 35-39, 101). He felt 100 percent certain of the identification, and he identified the applicant in the courtroom as the shooter (VIII R.R. at 38-39).

10. When patrol officers arrived at the scene, people were not forthcoming with information, a fact the patrol officer had found common in that area of town (VII R.R. at 48-53). People were frantic, ran around, and the crowd numbered over 100 people (VII R.R. at 56). Some people performed CPR on the three victims, but the officer saw no signs of breathing, and the victims did not appear to respond to the medical help (VII R.R. at 57). All three victims were pronounced dead at the scene (VII R.R. at 59-60).

11. The crime scene investigator found 18 shell casings at the scene (VII R.R. at 101, 103, 115-116, 129, 169). Nine of the casings lay in a concentrated area, but people could easily displace and move casings around (VII R.R. at 115-16). He also recovered a bullet fragment from a vehicle in the parking lot (VII R.R. at 103). A firearms examiner reviewed all the ballistics evidence and determined that two different weapons produced the casings located at the scene (VII R.R. at 157-70). Both weapons were .40 caliber firearms (VII R.R. at 170).

12. Houston Police Department Investigator John Brook worked the case with his partner Sergeant Chris Cegielski (VIII R.R. at 135-37). During the investigation, Brooks reviewed photographs downloaded from applicant's cell phone. (VIII R.R. at 137-41). The trial court admitted two of the photographs over objection (VII R.R. at 137-38). Someone took the photographs within hours after the shooting (VIII R.R. at 139). The applicant's friend, Devonte Bennett initially testified that he recognized people in the photographs and admitted he was in one of them, but then he refused to answer any more questions except to repeat "no", and ultimately he stated that he refused to testify (VII R.R. at 137-45)(VIII R.R. at 133).

13. Sergeant Cegielski explained that Coy Thompson, one of the victims, was a Crips gang member, and his gang name "Poppa C" came up in several investigations including a murder from January 2012 (VIII R.R. at 167). Yet, despite the word on the street that Coy Thompson set up the January murder, the State did not charge him with it, but

police charged two other Crips gang members with the crime (VIII R.R. at 168-70). Crips members shot three Bloods gang members during the January incident, two died, and a third survived to identify his assailants (VIII R.R. at 169).

14. The June murder investigation proceeded with few leads, but police did learn that Coy Thompson had texted a request at 1:30 a.m. to "Black Willow FPC," to "bring a strap" which police understood to mean a gun (VIII at 180-82). They later learned that FPC stood for Forum Park Crips (VIII R.R. at 181). Then, after many unproductive leads, Dedrick Foster contacted police and during the conversation, the investigator learned of a possible suspect (VIII R.R, at 196-99). He showed Foster a photo array containing a picture of the applicant. (VIII R.R. at 196-99). He then confirmed information provided by Mr. Foster with other information he had received during the investigation (VIII R.R. at 199). He obtained pocket warrants for the applicant, Todrick Idlebird, and Dexter Brown (VIII R.R. at 199-200). Later on the day he got the warrants, he learned of Oscar Jeresano's eyewitness account (VIII R.R. at 200-01).

15. During the investigators' interview with Jeresano, Jeresano provide a basic description of the shooter, and that description matched the suspect they had already developed (VIII R.R. at 203). After one of the investigator's provided Jeresano with the standard Houston Police Department Witness Admonishment form, he showed Jeresano the photo spread containing appellant's picture, and Jeresano "went straight to the [applicant's] picture and said, this is the guy with the gun" (VIII R.R. at

206). *State's Exhibit No. 54.* Jeresano then circled the photograph of the applicant, wrote his name, and wrote "shooter" next to it (VIII R.R. at 206-07). *State's Exhibit No. 52.* Jeresano also identified Dexter Brown as someone he saw at the club that night, but he did not recognize Todrick Idlebird's photograph (VIII R.R. 207-08).

16. The investigator interviewed Dexter Brown twice, but on each occasion, he did not find Brown's statements believable (VIII R.R. at 211-17). Idlebird's interview also did not lead officers to find his statements credible (VIII R.R. at 215). Ultimately, police released Brown rather than charge him with the capital murder (VIII R.R. at 219). During that time, another officer contacted the applicant appellant to request that (4) me for an interview, but the applicant never called to make an appointment (VIII R.R. at 220).

17. Police arrested the applicant with the pocket warrant on July 3, 2012, and he provided a custodial statement the jury heard during the trial (VIII R.R. at 221-24, 230). *State's Exhibit No. 58.* In the statement, the applicant contended that he went to the club on the night of the murder with his friend Michael Rhone, was outside when he heard shots, and that his friend pulled him into the club to avoid the gunfire. *State's Exhibit No. 58.* When asked what he wore that night, the applicant claimed he wore a green and white shirt, as well as blue jeans. *Id.* He claimed Rhone wore orange shorts, a white shirt, and orange shoes. *Id.* He provided police with Rhone's full name, a description of where he lived, as well as Rhone's home and cellular telephone numbers. *Id.* The applicant used

his cell phone to provide the numbers to police. *Id.* When the officer brought his phone into the interview room, the applicant pulled up the phone numbers for the officers using it, and even offered to call the numbers for them. *Id.*

18. When police found and spoke to Michael Rhone, however, he did not confirm the applicant's statement (VIII R.R. at 233). Likewise, Rhone testified at trial that he was not with the applicant the night of the shooting, and instead had been at a friend's house (VIII R.R. at 117). Police reviewed the photographs on the applicant's cell phone pursuant to a search warrant and they located two pictures taken within an hour of the shooting (VIII R.R. at 233-34, 243). *State's Exhibit No. 55, 56.* The photographs showed Dexter Brown's younger brother, along with Anthony Jones, Devonte Bennett, Dexter Brown, Deveon Griffin, Patrick Kennedy, and Tarah Bradley, the women who had provided Dexter Brown's alibi for the time of the shooting (VIII R.R. at 212, 234-35. The applicant wore the same clothes in both photographs, a white shirt and red pants, whereas Dexter Brown wore a green and white shirt in one of the photographs. (VIII R.R. at 235-38). Jeresano told police before viewing the photo arrays that the shooter was a black male who wore a black long-sleeved shirt and jeans (VIII R.R. at 261-63).

19. The investigator spoke to Anthony Jones, and his story matched Dexter Brown's statements (VIII R.R. at 238). He learned roughly two weeks later of Dedrick Foster's murder (VIII R.R. at 239). They spoke to a number of other witnesses, but the interviews did not lead to any new evidence (VIII

R.R. at 238-43). Pursuant to the same search warrant, police looked at texts the applicant had on his phone, but although not exactly incriminating, they indicted which of the people interviewed had been together and helped to identify everyone in the photographs (VIII R.R. at 243-44). Throughout the investigation, no witness identified anyone other than the applicant as a shooter, and policed discovered nothing to indicate the applicant was not the person responsible for the murders (VI R.R. at 251).

20. Autopsies performed on the three victims revealed that Carlos Dorsey sustained a gunshot wound to the right side of his face just below his ear (IX R.R. at 54). *State's Exhibit No. 60.* The wound perforated a major blood vessel in his neck, and he died from blood loss and internal bleeding (IX R.R. at 54, 61). Erica Dotson sustained a gunshot wound below her left armpit and another to her back, one of which perforated her lungs, her aorta, and a large blood vessel and artery that ran along her spine (IX R.R. at 66-69). The other bullet perforated one of her lungs and her kidney (IX R.R. at 71). Her wounds were consistent with her hunched toward the ground when shot (IX R.R. at 73). Coy Thompson had a bullet wound that entered the back of his right hip and struck his liver, right kidney, and passed through his heart before exiting out his left chest (IX R.R. at 78). Because the bullet passed through his heart, his wound would not have been survivable regardless of immediate medical intervention (IX R.R at 78). The gunshot wound to Mr. Thompson was also consistent with his leaning toward the ground when shot, and he had a second gunshot wound to his upper outer

right thigh (IX R.R. at 78-79). The medical examiner recovered bullets from Mr. Thompson and Ms. Dotson's bodies, but the firearms examiner determined that the two bullets were not consistent with the same weapon firing them (VII R.R. at 176)(IX R.R. at 81-82). *State's Exhibit No. 93.*

21. Mr. Dorsey's stepfather identified a photograph of Carlos Dorsey taken during his autopsy, as did Mr. Thompson's stepmother identify Coy Thompson in another of the autopsy photographs. (VII R.R. at 185-99)(IX R.R. at 941). *State's Exhibit Nos 61, 80.* Dorsey's stepfather explained that he was at the event that night working in the entertainment industry as an assistant to the promoter of the event (IX R.R. at 95).

DEFENSE'S EVIDENCE AT GUILT-INNOCENCE

22. Jeresano's attorney Brent Wasserstein testified as an impeachment witness. Wasserstein testified that Jeresano was found to be in possession of 10.9 kilograms of cocaine on Dec 4, 2011; that after Jeresano had been indicted on the federal drug charge he came to Wasserstein to indicate that he had witnessed a murder; that Wasserstein arranged for HPD to come to his office to interview Jeresano; that Jeresano had been indicted and pled guilty in federal court in Corpus Christi, but had not yet been sentenced; that the punishment range for Jeresano's crime was 10 years to life; that Jeresano was currently on federal bond; that Jeresano was facing possible deportation; that Jeresano's sentencing date had "continually" been reset in order for him to testify at the applicant's

trial; that he initially had been on a home detention secured by a GPS monitoring device, but those restrictions had been removed by order of the federal court (IX R.R. at 40-45).

23. Wasserstein explained that after Jeresano testifies in state court, he will make Assistant United States Attorney (AUSA) Patty Booth, the prosecutor responsible for Jeresano's federal case, aware of Jeresano's testimony; that Wasserstein will ask AUSA Booth to file a file a 5K1.1 motion "in which the Government will file and the judge will see it and he'll [the judge] decide if he is going to reduce the sentence based on his [Jeresano's] cooperation with the United States Government" (IX R.R. at 45).

24. On cross-examination, Wasserstein testified that Jeresano did not ask him if talking to the police about the capital murder would help his federal case; that he asked for a series of resets in Jeresano's federal case because once a person goes into federal custody it is difficult to get them to state court to testify; that he was hoping Jeresano's state court testimony would lead to a 5K1 motion being filed to "possibly get his sentence reduced"; that he told Jeresano "testifying will probably help him when it comes time for the judge to do the sentencing, but that there's no agreement between the Government and the defendant as to what the sentencing is going to be. It is going to be up to Judge Rainey in Federal Court" (IX R.R. at 45-49).

25. Dr. Steven Smith, Texas A & M professor of psychology, testified about memory research and potential inaccuracies in eyewitness identifications;

that the longer time you have to view something the more accurate it becomes that studies indicate individuals in high stress, high fear situations such as a shooting tend to present issues in their ability to recall the identity of someone involved in the shooting; that there are higher false positives when simultaneous photospreads are used; that issues exist in cross-racial identifications lead to a higher number of false identifications (IX R.R. at 103-33).

APPLICANT'S HABEAS CLAIM #1:
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

OVERVIEW OF CLAIM

26. The applicant alleges that trial counsel provided deficient representation in the following areas: (a) counsel failed to file a motion in limine and, if necessary, object to testimony that Dedrick Foster, was murdered two weeks after he talked to the police; (b) counsel failed to file a motion in limine and, if necessary, object to the opinions of the prosecutors and police officers that the applicant lied in denying that he committed the offense and was guilty; (c) counsel failed to object to testimony that Dedrick Foster and Devonte Bennett, who refused to testify, implicated the applicant; (d) counsel failed to move for a mistrial after Devonte Bennett refused to testify; (e) counsel failed to make consistent statements during closing argument about whether Jeresano was present at the scene of the capital murder; and, (f) counsel failed to elicit testimony that ADA Flader agreed to write a letter to

U.S. District Court Judge Rainey in exchange for Jeresano's testimony.

LEGAL STANDARD

27. The United States Supreme Court held in *Strickland v. Washington,* 466 U.S. 668, 686; 104 S.Ct. 2052, 2064 (1984), that the benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. The Court in *Strickland* set forth a two-part standard, which has been adopted by Texas. *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). First, the defendant must prove by a preponderance of the evidence that counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688). Reasonably effective assistance of counsel does not require error-free counsel. *Hernandez,* 726 S.W.2d at 58. Second, to obtain habeas corpus relief under *Strickland,* an applicant must show that his counsel's performance was deficient and that there is a "reasonable probability," one sufficient to undermine confidence in the result, that the outcome would have been different but for his counsel's deficient performance. *Ex parte Chandler,* 182 S.W.2d 350, 354 (Tex. Crim. App. 2005). Whether a defendant has received effective assistance is to be judged by "the totality of the representation," rather than isolated acts or omissions of trial counsel. *Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex. Crim. App. 1983). In evaluating a *Strickland* claim, it is presumed that trial counsel made all

significant decisions in the exercise of professional judgment. *Delrio v. State,* 840 S.W.2d 443, 447 (Tex. Crim. App. 1992). The Court will not use hindsight to second-guess a tactical decision made by trial counsel. *Chandler,* 182 S.W. 2d at 359. Moreover, trial counsel is not ineffective simply because another attorney might have employed a different strategy. *Strickland,* 466 U.S. at 689.

OVERVIEW OF REPRESENTATION

28. Based upon a review of the reporter's and clerk's record from the applicant's trial, as well as the habeas record, including the writ evidentiary hearing, the Court finds that trial counsel conducted a thorough pre-trial investigation, filed pre-trial motions, conducted a pre-trial motion to suppress hearing, made opening and closing arguments, lodged multiple and timely objections, cross-examined witnesses, and presented the testimony of two witnesses (Wasserstein and Dr. Smith).

29. The Court finds that at the writ evidentiary hearing the applicant chose to present the testimony of Vivian King, and to not present the testimony of Co-counsel Matthew Brown.

30. The Court finds the writ evidentiary hearing testimony of King to be credible (I W.R. at 233-311).

IATC ALLEGATION: COUNSEL FAILED TO FILE A MOTION IN LIMINE AND, IF NECESSARY, OBJECT TO TESTIMONY THAT DEDRICK FOSTER WAS MURDERED TWO WEEKS AFTER HE TALKED TO THE POLICE.

31. The applicant avers that trial counsel was ineffective for failure to file a motion in limine and object to the State's reference to the murder of Dedrick Foster; that, according to the applicant, Foster's murder was an "extraneous offense". *Applicant's Writ* at 8-9; *Applicant's Brief in Support* at 23.

32. To support this claim for relief the applicant points to the following: (a) the State's opening argument that the police had no leads in the capital murder until Foster came forward and helped develop the applicant as a suspect, but he could not testify because he was killed two weeks after he talked to the police (VII R.R. at 17); (b) Sgt. Cegielski testified without objection that Foster was murdered after the applicant was in custody (VIII R.R. at 239); and (c) the State argued in closing that Foster could not testify because he was dead (X R.R. at 5). *Applicant's Brief in Support* at 23.

33. The Court finds that the State did not list Foster's murder as an extraneous offense in its pretrial motions (C.R. at 289-91).

34. Based on its review of the trial record and the writ hearing testimony (I W.R. at 275, 299-301), the Court finds that King's trial strategy was to prevent the State from leaving an impression that the applicant was responsible for Foster's murder; that King achieved this strategy via the following: (a) in opening argument, King made clear that the

applicant was incarcerated at time of Foster's murder, and what Foster said was hearsay (VII R.R. at 24), (b) King successfully objected during Cegielski's testimony in order to limit the scope of the State's questioning regarding Foster's murder (VIII R.R. at 196-99), and (c) on cross-examination of Cegielski, King elicited testimony that the applicant was in jail at the time of Foster's murder and was not responsible for Foster's murder (VIII R.R. at 260-61).

35. The Court finds that King's trial strategy regarding testimony of Foster's murder was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO FILE A MOTION IN LIMINE AND, IF NECESSARY, OBJECT TO THE OPINIONS OF THE PROSECUTORS AND POLICE OFFICERS THAT THE APPLICANT LIED IN DENYING THAT HE COMMITTED THE OFFENSE AND WAS GUILTY.

36. The applicant avers that trial counsel was ineffective for failure to file a motion in limine and, if necessary, object to the pinions of the prosecutors and police officers that the applicant lied in denying that he committed the offense and was guilty. *Applicant's Writ* at 8-9; *Applicant's Brief* at 24.

37. To support his claim for relief the applicant points to the following: (a) the State asserted as it concluded its opening statement, "After hearing all of the credible evidence in this case, we're going to

ask you all to find what the police have found, what the State finds, what the evidence fined. We're going to ask you all to find him guilty of capital murder" (VII R.R. at 19-20); (b) Sgt. Cegielski testified without objection that Jeresano's description of the shooter fit one of the suspects (VIII R.R. at 203); and, (c) Sgt. Cegielski testified that he believed the applicant lied to him because Rhone did not confirm the applicant's statement that they were together at the club (VIII R.R. at 233).

38. The Court finds that during the writ evidentiary hearing, King explained her general strategy regarding lodging objections (I W.R. at 289-91):

> Well, I don't object to everything. I just do counter-argument and can I use – what some lawyers object to, I ask questions on cross-examination to get to that point. So that's not my trial strategy. I use cross, and I've been effective doing that through the years. And that's what I do. I do cross, and I do a counter-closing argument.
>
> I do not object to everything that is objectionable, because in my experience with over 200 appeals, cases are not reversed based on objections unless it's something cumulative. So I don't always object and get on the jury's nerves. I just get the story out, and let's try to fight it.

39. The Court finds that in response to the State's opening argument, King argued as she concluded her opening argument, "Be satisfied with the credibility of the witnesses, their biases, their prejudices, their motivations to lie and in the end you

will have a reasonable doubt that Uvukansi committed this murder and be strong enough when you come to that conclusion to find Mr. Uvukansi not guilty."; that this was an appropriate and adequate response to the State's opening argument.

40. The Court finds that Sgt. Cegielski's testimony that Jeresano's description of the shooter fit one of the suspects occurred in the context of laying predicate for introduction of the photospread (VIII R.R. at 233); that when Cegielski provided this testimony it was cumulative as Jeresano had already testified and provided an in-court identification of the applicant as the shooter (VIII R.R. at 5-113).

41. The Court finds that Sgt. Cegielski's testimony that he believed the applicant lied to him because Rhone did not confirm the applicant's story would likely have been admissible as lay opinion (I W.R. at 302); that a review of the trial record makes clear Sgt. Cegielski's opinion was offered based upon his investigation and knowledge of the facts of the case. TEX. R. EVID. 701; *Davis v. State,* 313 S.W.3d 317, 349-50 (Tex. Crim. App. 2010); *Fairow v. State,* 943 S.W.2d 895, 898- 99 (Tex. Crim. App. 1997).

42. The Court finds that, consistent with King's trial strategy, on cross-examination Sgt. Cegielski acknowledged that Rhone may not have been entirely truthful with him; that this mitigated the impact, if any, of his opinion regarding Rhone's truthfulness (VIII R.R. at 233, 273-75)(I W.R. at 301-03).

43. Considering the applicant's averments in the context of (a) the entire trial record, (b) TEX. R. EVID.

701, and (c) King's explanation of her strategy regarding objections, the Court finds the applicant's claim to be unpersuasive; that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO OBJECT TO TESTIMONY THAT DEDRICK FOSTER AND DEVONTE BENNETT, WHO REFUSED TO TESTIFY, IMPLICATED THE APPLICANT.

44. The applicant avers that trial counsel as ineffective for failure to object to testimony that Dedrick Foster and Devonte Bennett, who refused to testify, implicated the applicant. *Applicant's Writ* at 8-9; *Applicant's Brief* at 26-27.

DEDRICK FOSTER

45. With regard to Foster, to support his claim for relief, the applicant points to the following to support his claim for relief: (a) the State's violation of a motion in limine during opening argument that the applicant was developed as a suspect based on information provided by Foster, who could not testify because he had been murdered (VII R.R. at 17); (b) the State's elicitation of testimony from Sgt. Cegielski that he showed Foster a photospread including the applicant and was "able to confirm the information that he was giving you from other information you already had?" (VIII R.R. at 198-99); (c) the State's closing argument that the police had no leads until Foster came

forward and "gave this defendant's name as someone involved in the shooting" (X R.R. at 31,35).

46. The Court finds that King, during her opening statement immediately responded to the State's argument regarding Foster; that King made clear the applicant was incarcerated at time of offense, and what Foster said was hearsay (VII R.R. at 24).

47. The Court finds that King timely objected during direct examination of Sgt. Cegielski to limit the scope of the questioning regarding Foster's murder (VIII R.R. at 196-99); that Cegielski's testimony that Foster was "able to confirm the information that he was giving you from other information you already had?" was cumulative of Jeresano's eyewitness testimony and in-court identification of the applicant as the shooter (VIII R.R. at 5-113).

48. The Court finds that on cross-examination of Sgt. Cegielski, King elicited testimony that Foster was not at the club at the time of the capital murder; that the applicant was in jail at the time of the Foster's murder; that the applicant was not responsible for the Foster's murder (VIII R.R. at 260-61).

49. Considering the applicant's averments in the context of the entire trial record, and the writ evidentiary hearing record (I W.R. at 303-05), the Court finds the applicant's claim to be unpersuasive, that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

DEVONTE BENNETT

50. To support his claim for relief with regard to Bennett, the applicant points to the following: (a) Sgt. Cegielski testified that Bennett's statements matched the evidence he had developed to that point (VIII R.R. at 243-44); and (b) during closing argument the State argued that Bennett's statement was consistent with Jeresano's (X R.R. at 35).

51. The Court finds that Bennett was "unavailable" as a witness because he refused to testify, therefore Sgt. Cegielski's testimony that Bennett's statements matched the evidence he had developed to that point was not hearsay, and the State's closing argument and jury argument was proper (I W.R. at 303-06). TEX. R. EVID. 804(a)(2); *see Ward v. State,* 910 S.W.2d 1, 3 & n.2 (Tex. App.—Tyler, pet. ref'd) (when witness first suggested that she could not remember events and then persisted in refusing to testify about the event, she became "unavailable").

52. The Court finds that the jury charge included language that Bennett's refusal to testify could not be considered as evidence against the applicant (C.R. at 1,087); that the jury was deemed to have followed the charge. *Gamboa v. State,* 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

53. The Court finds that King objected to the following portion of the State's closing argument as improper: "Now, Devonte got up on the stand and refused to speak. Here's what he did not do? He did not plead the Fifth? What does that mean? If you could incriminate yourself"; that the Court sustained this objection; that upon King's request, the

Court instructed the jury to disregard the State's argument; that King's request for a mistrial was denied. (X R.R. at 33-34).

54. Considering the applicant's averments in the context of the of the trial record, the writ evidentiary hearing record, and TEX. R. EVID. 804(a)(2), the Court finds the applicant's claim to be unpersuasive; that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO MOVE FOR A MISTRIAL AFTER DEVONTE BENNETT REFUSED TO TESTIFY.

55. The applicant avers that trial counsel was ineffective for failing to move for a mistrial when Bennett refused to testify. *Applicant's Writ* at 8-9; *Applicant's Brief* at 29-30.

56. To support his claim for relief, the applicant asserts King should have moved for a mistrial when (a) Bennett refused to testify because the State indicated during its opening statement that the evidence would show Bennett came forward after the applicant was charged with capital murder and identified the applicant as the shooter (VII R.R. at 19); and (b) when the Court sustained two objections by King to cross-examination questions of defense expert Professor Smith regarding the accuracy of Bennett's identification of the applicant as the shooter (IX R.R. at 155-56). *Applicant's Writ* at 9; *Applicant's Brief* at 29-30.

57. The Court finds that the State's opening argument was not evidence for the jury to consider. *Bigby v. State*, 892 S.W.2d 864, 886 (Tex.Crim.App.1994).

58. The Court finds that the jury charge instructed that Bennett's refusal to testify could not be considered as evidence against the applicant; that King requested this specific instruction (C.R. at 1,087)(I W.R. at 309).

59. The Court finds that the jury charge instructed the jury not to consider "any matters not in evidence" (C.R. at 1,089).

60. The Court finds that the jury was deemed to have followed the charge. *Gamboa,* 296 S.W.3d at 580.

61. Considering the applicant's averments in the context of the trial record, the writ evidentiary hearing record, and well established jurisprudence regarding the presumption that the jury is deemed to follow instructions, the Court finds the applicant's claim to be unpersuasive; that King's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO MAKE CONSISTENT STATEMENTS DURING CLOSING ARGUMENT ABOUT WHETHER JERESANO WAS PRESENT AT THE SCENE OF THE CAPITAL MURDER.

62. The applicant avers that trial counsel was ineffective for providing inconsistent closing statements. *Applicant's Writ* at 9; *Applicant's Brief* at 31.

63. To support his claim for relief, the applicant asserts that King argued Jeresano was at the nightclub selling cocaine at the time of the capital murders while Co-counsel Brown argued that Jeresano was not at the nightclub at all (X R.R. at 14, 26).

VIVIAN KING

64. King explained her closing argument strategy during the writ evidentiary hearing; she believes her closing argument was a reasonable deduction from the evidence given that cocaine was found at the scene and Jeresano pleaded guilty to a multi-kilo cocaine case (I W.R. at 296).

65. The Court finds King's explanation of the rationale supporting her closing argument strategy to be credible and in accord with prevailing professional norms. ***Strickland,*** 466 U.S. at 698-700.

MATTHEW BROWN

66. During the writ evidentiary hearing, King explained that she was caught off-guard by Brown's closing argument; that she talked with Brown after the trial "to see what he was thinking"; that he explained that there could be a reasonable possibility that Jeresano was not at the nightclub given that they never could obtain from the federal government the readings from Jeresano's GPS monitor he was required to wear while on bond; that King explained, "And what he [Brown] told me, I understood because we never felt comfortable that he was there, and if he was there, he was there to

sell dope. I mean we thought both was a possibility." (I W.R. at 298-99).

67. The State was silent regarding the lack of consistency between King and Brown when it made its closing argument (X R.R. at 28-36).

68. The Court finds that in evaluating a *Strickland* claim, it is presumed that trial counsel made all significant decisions in the exercise of professional judgment. *Delrio,* 840 S.W.2d at 447 (Tex. Crim. App. 1992); that Brown is entitled to this presumption; that the applicant elected to not subpoena Brown to testify at the evidentiary hearing even though he had raised Brown's performance as a claim for relief; that, accordingly, the applicant fails to pierce the favorable presumption to which Brown is entitled. *Strickland,* 466 U.S. at 698-700.

69. Considering the applicant's averment in the context of the trial record, the writ evidentiary hearing record, the applicant's failure to subpoena Brown to testify at the writ evidentiary hearing, and well established jurisprudence regarding the presumption that Brown is entitled to a presumption that he exercised professional judgment, the Court finds the applicant's claim to be unpersuasive; that King's and Brown's performance was reasonable and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

IATC ALLEGATION: COUNSEL FAILED TO ELICIT TESTIMONY THAT ADA FLADER AGREED TO WRITE A LETTER TO U.S. DISTRICT COURT JUDGE RAINEY IN EXCHANGE FOR JERESANO'S TESTIMONY

70. The applicant avers that King was ineffective for failing to properly present impeachment evidence regarding Jeresano's agreement that Flader would write a letter to U.S. District Judge Rainey for his consideration when he sentenced Jeresano. *Applicant's Writ* at 8; *Applicant's Brief* at 27-28.

71. To support his claim for relief, the applicant asserts the following:

> Flader informed King at a pretrial hearing that she would 1-4 a letter to the federal judge regarding Jeresano's cooperation before he was sentenced (III R.R. at 5-6). Flader did not elicit on direct examination of Jeresano that she would write this letter. Jeresano denied on cross-examination that he might receive leniency in exchange for his cooperation and testimony (VIII R.R. at 48-49). Wasserstein testified that, after Jeresano testifies, he will notify the federal prosecutor so she could file a 5K1.1 motion, and the judge would decide whether to reduce the sentence (IX R.R. at 45). King did not elicit that Flader had agreed to write a letter to the Judge on Jeresano's behalf.
>
> *Applicant's Brief* at 27-28.

72. The Court finds the record reflects Flader was appropriately forthcoming that-she intended to

write a letter to Judge Rainey after Jeresano testified; that the following exchange took place between Flader and King during a pre-trial setting regarding the State's compliance with the defense's motions for disclosure (III R.R. at 5-6, 25-26).

> (MS. FLADER): Number five is: Any relationship that exists between the government and any witness, potential witness, or informant to be inclined, encouraged, or perceived some personal benefit in response to the government or defense request for information or testimony. In regards to that, the State's prosecutor has agreed to write the federal judge about one of the witness' cooperation in the case. That witness is currently pending a sentencing for a federal drug charge. And we'll discuss that a little bit more in the future, but the State has agreed to write the federal judge about that witness' cooperation in the case.
>
> MS. KING: I'd like that witness' name on the record, please.
>
> MS. FLADER: Oscar – I'm trying to remember his last name.
>
> MS. KING: I think I wrote it down on this next deal as I know it.
>
> MS. FLADER: I don't know what you wrote it down on.
>
> MS. KING: I know you don't. I'm sorry.
>
> THE COURT: You've got the name, right?
>
> MS. FLADER: Oscar Jeresano.

THE COURT: Okay.

MS. FLADER: All right. The next one is a request –

MS. KING: Let me ask one more question, please, to the prosecutor on that. And Oscar Jeresano, I believe he pled guilty to a federal offense in the federal district – Southern District of Texas, Victoria, if I'm not mistaken, possibly in 2012 or '13. And the question is for the record: Is his case – is he awaiting sentencing until after he testifies in the State's case against my client, Feanyichi Uvukansi?

MS. FLADER: The information that I have is he is awaiting sentencing and his defense attorney has been asking for continuances on that sentencing until after this case has been completed.

MS. KING: And I just want to make sure it's clear. Based on your information, Madam Prosecutor, Mr. Oscars defense lawyer is asking the Federal Court to delay sentencing until after he testifies against Uvukansi in this case?

MS. FLADER: Yes.

THE COURT: Okay.

. . .

MS. FLADER: Okay. Number four is the federal plea agreement to cooperate with the State in this case for Oscar Jeresano. There was no plea agreement for that witness to cooperate in this case. Any agreements made

with the witness, there have been no agreements other than what was previously put on the record that the State did tell defense counsel for Mr. Jeresano that she would write a letter to the federal judge informing him of the witness' cooperation on this capital murder case.

MS. KING: And I'd ask: Was that done in writing – by e-mail or in writing, that commitment?

MS. FLADER: I believe I just told him.

MS. KING: If it was via e-mail or any written form, I would ask that that be provided to defense counsel.

MS. FLADER: Sure.

MS. KING: Thank you.

73. The Court finds that King called Jeresano's attorney Wasserstein as a witness to impeach Jeresano; that during direct and cross-examination of Wasserstein, the jury heard the following testimony regarding a possible downward departure in Jeresano's federal sentencing as a result of his testimony in the applicant's case (IX R.R. at 40-49):

(BY MS. KING) Q. And after he testifies in this trial, you will inform the prosecutor, the United States prosecutor that he did testify in exchange for the prosecutor to file a Federal motion for the judge to reduce his sentence; is that correct? If you would like I could show that to you.

A. Well, for the most part I'm going to let Patty Booth, who is the assistant U.S. attorney know that he's testified and ask them to file a motion. It's called a 5K1 motion in which the Government will file and the judge will see it and he'll decide if he's going to reduce the sentence based on his cooperation with the United States Government.

(BY MS. FLADER) And as his attorney are you trying to get him the best possible deal?

A. Absolutely.

Q. Have you ever explained the potential for this, I don't even know what it's called, 5K1; is that right?

MS. KING: Yes, ma'am.

MS. FLADER: 5K1.

MS. KING: 1.1.

Q. (BY MS. FLADER) 1.1 to be filed after he has cooperated with this case?

A. I haven't explained to him what a 5K1 is. I have told him that him testifying will probably help him when it comes time for the judge to do the sentencing, but that there's no agreement between the Government and the defendant as to what the sentencing is going to be. It's going to be up to Judge Rainey in Federal Court.

. . .

Q. (BY MS. FLADER) And you testified that you've asked for resets, for his sentencing to be reset. Why have you done that?

A. For a few reasons, number one, I'm hoping that his cooperation with the State is something that I can ask the assistant U.S. attorney to file this 5K1 motion to possibly get his sentence reduced. Also, from my understanding and from practicing that once somebody goes into Federal custody, it's difficult to get them out to testify in court.

74. The Court finds from the trial and writ evidentiary hearing records that King's trial strategy regarding impeaching Jeresano included an exploration of the details of a possible downward departure of his federal sentence premised upon his cooperation with the State in the applicant's case; that to implement this strategy, King questioned Jeresano and Wasserstein about the details of Jeresano's federal plea bargain; that King felt it was strategically unnecessary to question Jeresano or Wasserstein about the letter Flader intended to write; that the following portions of King's testimony at the writ evidentiary hearing support the Court's finding (I W.R. at 257-60, 306).

(BY MR. SCHAFFER) Q. Why didn't you impeach him with the plea agreement?

A. I thought I had made my point by talking about it in front of the Court and by subpoenaing his lawyer to talk about the agreement in case he was not smart enough to know that is what we called it.

. . .

A. I did not make a bill because I believe that Judge Price sustained – he did sustain the objection. But my trial strategy was to bring in his lawyer, to talk to his lawyer about the agreement because I really believe that Mr. Jeresano just wasn't smart enough to understand what his agreement was. I mean, he knew what he was doing.

So I went as far as to call the lawyer, which is unusual in trial, but I did, and his lawyer testified. So I was going to get to it another way.

Q. Well, then, Mr. Jeresano wasn't honest enough to admit it.

MR. REISS: Objection, argumentative.

THE COURT: Sustained.

Q. (By Mr. Schaffer) But the only way to challenge the judge's ruling would be to make the bill, correct?

A. That's not the only way.

Q. Okay. Well, then –

A. I mean, I – well, I was trying to win the trial. I was trying to get to the evidence so that I could argue it before the jury that the guy had an agreement and he knew it. So I wanted his lawyer to say he had an agreement and he told me about the agreement, which I believe his lawyer did.

. . .

Q. Now, why didn't you ask Mr. Wasserstein whether Ms. Flader had agreed to write a letter to the judge regarding Jeresano?

A. Because I thought by Jeresano's lawyer explaining that his client was testifying and expecting to get a downward departure answered – that was what I wanted. I wanted the jury to know that was the bias and that the lawyer explained it.

Q. Well, but Ms. Flader had represented to the jury through Jeresano's testimony that he was testifying because his uncle had been murdered and he wanted to help the victims' families, not that she agreed to write a letter for him, correct?

A. I understand that, but I couldn't get him – they wouldn't let him testify. I mean, that's the way – that's my approach in trying to get the information out. But there was an agreement by his lawyer who ultimately did the negotiating with the feds, the federal prosecutor, to get on the witness stand and say there was an agreement that he told his client about. And so that was my point so the jury could then see the guy was lying, that Jeresano was lying.

Q. So why didn't you elicit from Wasserstein that Flader had agreed to write a letter to the judge after he testified?

A. I didn't think it was necessary. It had already been sustained. I thought that the

agreement that his lawyer had negotiated was enough.

Q. Well, it had been sustained through questioning Jeresano because the judge said Jeresano claimed he didn't know anything about it but –

MR. REISS: Objection, leading.

THE COURT: I haven't heard the question yet.

Q. (By Mr. Schaffer) But Wasserstein did know something about it, so he would have personal knowledge of that agreement, would he not?

THE COURT: Sustained to leading. Ask another question.

Q. (By Mr. Schaffer) Would Wasserstein have personal knowledge of the agreement with Flader?

A. Yes.

Q. So if the jury was going to find out about the letter, based on Judge Price's ruling, would it have to find out through Wasserstein rather than Jeresano?

A. You know what, hold on. I'm sorry. I misstated something. I misunderstood your question. I meant that Wasserstein, the lawyer, would know because he had the agreement with the federal prosecutor, as I stated a few comments ago, not necessarily with Gretchen. I didn't know about what he knew about with

Gretchen because this deal was all based on the federal prosecutor.

Q. Well, but Flader had disclosed to you before trial that she had made an agreement with Wasserstein to write the letter to the judge.

A. Yes, sir. But in my mind, that wasn't the dispositive fact. To me, I mean, the federal prosecutor could have asked anybody on that team. Gretchen didn't try that case by herself, she had a co-counsel. So the federal prosecutor, based on my experience, could have talked to either one of them or the federal prosecutor could have looked on JIMS and saw there was a conviction and just gave him the 5K. I didn't think a letter was dispositive of giving a 5K. I thought it was testimony and conviction.

Q. The letter would have impeached his testimony that he had no motive to testify for any reason other than to help the victims' families, wouldn't it

MR. REISS: Objection, leading.

THE COURT: Sustained.

Q. (By Mr. Schaffer) How could you have used the letter to impeach his testimony on direct examination regarding his motive?

A. I could have used it to further my theory that he was doing it only to get a benefit, but I didn't think that was the only way. I thought the best way was to show that the night of the melee with hundreds of people in the parking

lot, he did not come forward and tell the police what he saw. I never – it was always suspicious to me that he would wait and go to a lawyer that's representing him on his federal case to then get with the prosecutors instead of being a good citizen that night and reporting what he saw that night. I thought – that was my trial strategy to show that he wasn't right, that he was a liar because he didn't come forth that night. I didn't get into the details that you're getting into because that's obviously what your trial strategy would have been. Mine was different.

. . .

[BY MR. REISS] Q. But just so the record is absolutely clear

A. Okay.

Q. – please explain your trial strategy as to why you did not ask Mr. Wasserstein the question about the letter.

A. Okay. I knew based on my federal experience and by talking to Mr. Wasserstein pretrial, that the prosecutor was going to give him a downward departure if he testified truthfully. I could not get him to say it exactly. I couldn't really get him to say it pretrial other than, "We talked to him. Yes, he's going to get something, I don't know what," which in actuality in federal cases is true. You don't know what you're going to get because the judge makes the final decision. But if I try to ask the question once or twice and they keep evading

> the answer, I'm just not going to keep asking. I try to get it another way. But I thought that when I talked to his lawyer, his lawyer gave me a lot of information that's, you know, unusual in a trial because I thought he basically admitted that his client had a deal.

75. Considering the applicant's averment in the context of the trial record, the writ evidentiary hearing record, and well established jurisprudence regarding deference to trial counsel's strategic decisions, the Court finds the applicant's claim to be unpersuasive; that. King's performance was a reasonable, informed strategic choice and in accord with prevailing professional norms. *Strickland,* 466 U.S. at 698-700.

APPLICANT'S HABEAS CLAIM #2: THE STATE USED AND FAILED TO CORRECT FALSE TESTIMONY

OVERVIEW OF CLAIM

76. The applicant avers that the State used and failed to correct Jeresano' testimony regarding consideration he might receive in federal court in exchange for his state court testimony; that Jeresano's testimony did not reveal that Flader agreed to write a letter to U.S. District Court Judge Rainey regarding his testimony in the applicant's case. *Applicant's Writ* at 7; *Applicant's Writ* at 8-18.

LEGAL STANDARD

77. The State's use of material false testimony violates a defendant's due-process rights under the

Fifth and Fourteenth Amendments to the United State constitution. *Ex parte Weinstein,* 421 S.W.3d 656, 665 (Tex. Crim. App. 2014) (citing *Ex parte Fierro,* 934 S.W.2d 370, 372 (Tex.Crim.App1996) et.al.

78. In order to be entitled to post-conviction habeas relief on the basis of false evidence, an applicant must show that **(1) false evidence was presented at his trial** and **(2) the false evidence was material to the jury's verdict of guilt**. *Ex parte Weinstein,* 421 S.W.3d 656, 659-65 (Tex. Crim. App. 2014). An applicant must prove the two prongs of his false-evidence claim **by a preponderance of the evidence**. *Id.*

79. To determine whether a particular piece of evidence has been demonstrated to be false, the relevant question is whether the testimony, taken as a whole, gives the jury a false impression. *Ex parte Ghahremani,* 332 S.W.3d 470, 479 (Tex. Crim. App. 2011).

80. False testimony is material only if there is a **reasonable likelihood** that the false testimony affected the judgment of the jury or affected the applicant's conviction or sentence. *Weinstein,* 421 S.W.3d at 665.

ALLEGATION: THE STATE USED AND FAILED TO CORRECT JERESANO'S FALSE TESTIMONY.

81. Before the applicant's trial, Flader disclosed to King that she intended to write a letter to Judge Rainey about Jeresano's "cooperation"; that Flader

would send the letter after Jeresano testified in the applicant's case (III R.R. at 5-6, 25-26).

82. Wasserstein requested that Flader write a letter to Judge Rainey regarding his cooperation with the State in the applicant's case; that Wasserstein intended the letter in order to show Jeresano's "good character"; that Flader's letter would supplement the federal court's consideration of cooperation Jeresano was also providing the federal government in his narcotics case; that Flader's letter was not a condition precedent for the U.S. Attorney's Office to file a 5K1.1 motion (I W.R. at 202-05, 220).

83. The Court finds that the trial and writ evidentiary records reflect that Flader's legal career has been focused in the area of Texas criminal law; that, at the time of the applicant's trial, Flader was unfamiliar with the nuances of federal sentencing guidelines; that Flader remains unfamiliar with the nuances of federal sentencing guidelines (VIII R.R. at 83-88)(IX R.R. at 47-48)(I W.R. at 101-02).

84. The Court finds that there was no *quid pro quo* arrangement between the State and Jeresano; (I W.R. at 115, 202).

85. The Court finds that Flader credibly believed Jeresano would receive federal penitentiary time after his testimony but was hopeful that it would be "on the lower end of the range based on my letter"; that she ultimately did not believe her letter would be important" or actually affect his sentence because, "Judges get letters from people in sentencing all the time, and the judge gets to decide

what they want to do with that letter" (I W.R. at 119).

FALSITY EXAMINATION

86. On direct examination, Jeresano testified to the flowing regarding the status of his pending federal sentencing (VIII R.R. at 35)

> [BY MS. FLADER] Q. What is the current status of your federal case?
>
> A. I have pled guilty already, and now I'm waiting for sentencing.
>
> Q. Have you been made any promises for testifying in court today?
>
> A. Nope.
>
> Q. Have they told you that the range of punishment is going to be lowered?
>
> A. No.
>
> Q. What is your understanding of what the possibilities are for your range of punishment?
>
> A. Ten years to life.

87. The Court finds Jeresano's answer ("Nope") to the question, *"Have you been made any promises for testifying in court today?"* misleading the jury regarding any benefits Jeresano may obtain for testifying.

88. The Court finds that the Merriam-Webster defines "promise" as a declaration that one will do or refrain from doing something specified.

89. The Court finds that before the trial and during Jeresano's testimony, Jeresano knew that his cooperation to testify in the Appellant's trial could be considered by the federal judge to determine if his federal sentence would be reduced below the minimum punishment. (Writ Record 169, line 11-19; lines 24, 25;); (Writ Record 170, lines 1-6; lines 14-18).

90. The Court finds that Jeresano knew that if he cooperated *(i.e, his testimony was helpful to the State's case)* that the federal prosecutor would do something, which was to present information to the federal judge that he cooperated by testifying in a State trial so that the judge could consider whether he would do something; such as, reduce his sentence below the sentencing guidelines.

91. The Court finds that Jeresano knew the foregoing because his attorney, Wasserstein, told him that the federal prosecutor had declared it to be the case. (Writ 169, line 24; 170, lines 1-6).

92. The Court finds that during the Writ Hearing, attorney Wasserstein testified that he told Jeresano before trial that the federal prosecutor (Booth) would file a motion to reduce his sentence if he testified. (Writ 185, lines 1-13)

93. Moreover, the Court finds that during the Writ Hearing, attorney Wasserstein testified that Flader promised him that she would do something, that

is, write a letter to the federal judge after Jeresano testified. (Writ 182, lines 18-21).

94. The Court finds that prior to the trial day, Wasserstein told Jeresano that Flader would write a letter to the federal judge if he testified. (Writ 184, lines 22-25)

95. The Court finds Wasserstein's testimony to be credible.

96. The Court, thus, finds there was a "promise" made to Jeresano and his attorney by the State prosecutor (Flader) and the federal prosecutor (Booth).

97. The Court finds the foregoing testimony elicited by Flader to be **FALSE**.

98. On cross-examination, Jeresano testified to the following regarding the status of his pending federal sentencing.

> [BY MS. KING] Q. And you did have a plea agreement that says if you cooperated with the State in this case, they would consider giving you a 5K1 reduction under the Federal sentencing guidelines?
>
> A. Not that I know of.
>
> Q. Your lawyer never told you that?
>
> A. No.
>
> Q. And the prosecutors never told you that?
>
> A. I never talked to the prosecutor before.
>
> Q. So when you got your federal case, you didn't study what would happen in terms of

how much time you could give if you cooperated versus how much you would get if you didn't?

A. Excuse me.

Q. You have no idea?

A. I don't understand the question. Can you repeat it?

Q. Yes. You know with ten kilograms of cocaine you could get 30 years in federal prison?

A. Yes.

Q. And be deported?

A. I could get more than 30 years.

Q. You can get up to life, right?

A. Uh-huh.

Q. And depending on your criminal history; is that correct?

A. Yes.

Q. And so you know in cooperating with the State in this case, you can get a lot less time; is that correct?

A. Nobody has ever, ever told me that I'm going to get less time for helping this case, nobody.

Q. No one has ever told you that?

A. No. I'm here by my own free will, not to help myself. I'm here to help the families of the people that died, nothing else.

Q. Would you let your – if your lawyer came to court would you allow him to tell us that?

A. Yes.

99. The trial and writ evidentiary hearing records reflect that the jury was removed shortly after Jeresano testified that "Nobody has ever, ever told me that I'm going to get less time for helping this case, nobody".

100. The Court finds that Wasserstein was present during Jeresano's testimony at trial, and on cross-examination by attorney King, Wasserstein saw that Jeresano's testimony was confusing (VIII R.R. at 170) and on the break before Jeresano had been excused as a witness, Wasserstein spoke with him regarding that it was possible that the federal judge could depart below the statutory minimum if the motion (5K1.1) was filed. (Writ Record 169, lines 12-18)

101. The Court finds that after Wasserstein spoke with Jeresano on the break, that Jeresano had a general understanding of his cooperation agreement. (Writ 169, lines 15-18); (Writ 170, lines 17, 18).

102. The Court finds that on cross-examination, Jeresano's answer, *("Not that I know of.")* to King's question "*And you did have a plea agreement that says if you cooperated with the State in this case, they would consider giving you a 5K1 reduction under the Federal sentencing guidelines?"* was **FALSE** regardless if Jeresano did or did not understand the terminology, "5K1"; clearly there is no response from Jeresano in the record stating he

did not understand what "5K1" meant. Jeresano's attorney, Wasserstein, testified in the Writ Hearing that prior to the jury trial in the case at hand, Jeresano signed a plea agreement in federal court that contained the 5K1 provision, and that the he and the judge explained to Jeresano that he could get a possible reduction if he gave substantial assistance. (Writ 188, lines 11-25; 189, lines 7-25; 190, lines 1-11)

103. The Court finds that a follow-up question, a long these same lines, by King – *"And so you know in cooperating with the State in this case, you can get a lot less time; is that correct?",* was not answered by Jeresano. Instead of Jeresano answering, "Yes" or *"No"*, Jeresano answered an entirely different question responding – *"Nobody has ever, ever told me that I'm going to get less time for helping this case, nobody."*

104. The Court finds that Jeresano's nonresponsive answer does not establish he made a false or misleading statement to King's question because there was no evidence that anyone told Jeresano that he was going to get his sentenced reduced; his response stated the truth, that is, there was no certainty that he would get a sentence reduction from the judge as that was totally within the judge's discretion.

105. The trial record reflects that the attorneys held a bench conference while the jury was removed from the courtroom (VIII R.R. at 81-98); that during the bench conference King moved to impeach Jeresano with an e-mail she received from the United States Attorney's Office; that the

e-mail explained Jeresano's plea agreement was a "standard" plea agreement containing a provision "whereby the Government will recommend to the Court the sentence reduction under U.S. sentencing guideline Section 5K1.1, if the defendant provides substantial assistance as in the State or Federal prosecution"; that Flader objected that use of the e-mail would be improper impeachment because Jeresano had already testified that no one had told him he would receive less time for his cooperation (VIII R.R. at 88); that the Court sustained the State's objection (VIII R.R. at 93); that the Court explained its ruling. The fact that we've been talking about [Section 5K1.1] doesn't mean anything as far he is concerned. He doesn't know. Does his lawyer know? Maybe so." (VIII R.R. at 93); that the Court invited King to impeach Jeresano through Wasserstein (VIII R.R. at 96). *[Although Flader testified initially that she objected to the letter, she later stated that she believed that she was objecting to King questioning the defendant regarding something he testified on cross-examination that he did not know about, the SKI. (See Writ 63, lines 10-20; 64, lines 1-7)]*

106. The Court finds that at the time of the jury trial in the case at hand, Jeresano may not have fully understood what the term 5K1.1 meant, because Wasserstein testified that he only went over the term "5K1.1" the day before Jeresano's federal rearraignment. Nevertheless, the Court finds that Jeresano had the opportunity to hear the term mentioned to him on the day Wasserstein explained it to him and during his re-arraignment in front of the federal judge. (I W.R. at 211).

107. The Court finds that when King asked the question regarding receiving a 5K1.1 reduction, Jeresano did not respond by saying that he did not understand what 5K1.1 reduction meant, but he answered the question.

108. The Court finds that King's impression was that Jeresano "just wasn't smart enough to understand what his agreement was" (I W.R. at 254).

109. The Court finds that Wasserstein indicated Jeresano *"understood about cooperation. But using 5K1, we probably read over it, but I didn't go specifically into it"* (I W.R. at 211).

110. The Court finds that the determinative inquiry regarding the applicant's falsity allegation rests on whether or not Jeresano's direct examination testimony that he had not been "made any promises for testifying in court today" gave the jury a false impression when the testimony is examined as a whole. *Ghahremani,* 332 S.W.3d at 479.

The Court finds that the State did present false testimony, and gave the jury a false impression when examined as a whole.

111. The Court finds that Flader told King before trial that she promised Wasserstein she would write a letter to the federal judge if Jeresano cooperated with the state's case and testified. (Writ 232, lines 8-12)

112. The Court finds that such evidence may be considered relevant impeachment evidence as it

relates to the credibility of Jeresano as a witness and his motive to testify untruthfully.

113. The Court finds, however, that although Flader revealed this information to King as well as information that she would notify the federal prosecutor about Jeresano's cooperation if he testified, for all practical purposes it was for naught. During Flader's presentation of Jeresano's testimony she elicited a sworn response from him that was false, that is, that he had not been made **any** [emphasis added] promises for testifying in court. Further, Flader objected to King asking Jeresano about the information contained in an email that included information about the 5K1 reduction. Flader's objection was sustained and thus prevented King from simply asking specifically if Jeresano knew whether or not Flader would write a letter to the federal judge if he testified. (Writ 63, lines 5-10)

114. The Court finds that false testimony elicited on direct examination by Flader coupled with his false and misleading testimony on cross examination by King left a false impression with the jury.

115. The Court finds, however, Jeresano's credibility was impeached on Flader's cross-examination of Wassertein during the jury trial when Wasserstein testified **that he did explain to Jeresano that testifying will probably help him when it comes time for** the judge to do the sentencing, but that there was no agreement to what the sentence would be that it would be up to the judge. (Writ 47, lines 17-25; 48, lines 1-4)

116. The Court finds that, even if Jeresano's testimony that *"he was not made any promises"* was regarded to be "false," that testimony was not **"material"** since there is not a ***reasonable likelihood*** that it affected the judgment of the jury since Flader impeached Jeresano through the cross examination of Wasserstein when Wasserstein testified that he did in fact tell Jeresano that testifying would probably help him in his federal court case.

117. The Court finds that although the jury did not hear evidence that if Jeresano testified in the State's case, Flader would write a letter to the federal judge in order to help Jeresano get a reduced sentence, there was other evidence that the jury heard that impeached Jeresano's credibility or that showed he had a motive to testify untruthfully – Wassertein's testimony on cross-examination by Flader was such impeachment evidence, and on direct examination by King.

118. The Court finds that Jeresano was also thoroughly impeached with the following: (a) he pleaded guilty to a federal multi-kilo narcotics case and was awaiting sentencing, (b) he was subject to a punishment of 10 years to life, (c) he was subject to deportation if convicted,(d) his conditions of bond had been modified for his benefit, (e) his case had been continually reset for approximately two years so that he could testify in the applicant's trial., (f) Wasserstein planned to notify the federal prosecutors of Jeresano's testimony in the applicant's trial and request that the government file a 5K1.1 motion to reduce his sentence based upon his cooperation, and (g) rather than

immediately report his eyewitness account to the police he informed his attorney of his account and several days later gave a statement to law enforcement. See, *Weinstein,* 421 S.W.3d at 667-68. See RR Vol 8 p. 44, lines 13-19

119. The Court finds that Jeresano's testimony was necessary as he was the only witness called by the State to prove Appellant was the shooter who killed the complainants.

120. The Court finds that although Jeresano was not further impeached with evidence of the letter that Flader would write to the federal judge, it's impeachment value or weight could be considered very similar to the impeachment value and weight the jury was able to give to the evidence that Jeresano did in fact know – that he could possibly get a sentence reduction in his federal case.

121. The Court concludes the Applicant must still prove his habeas-corpus claim by a preponderance of the evidence, but in doing so, he must prove that the **false testimony was material and thus it was reasonably likely to influence the judgment of the jury**. *Ex parte Weinstein,* 421 S.W.3d 656 at 665.

122. The Court finds that although the letter could have been considered to have a cumulative effect with the other impeachment evidence whereby the jury may have determined that Jeresano was not credible as to his relevant testimony – identifying the shooter, **the Appellant has not established by a preponderance of the evidence that the false statement of –** *"Nope." He had not been promised anything for his testimony (specifically,*

he had not been promised a letter would be written to the federal judge if he testified) **was reasonably likely to influence the judgment of the jury.**

123. The Court finds that, for instance, had the issue been that the false testimony was that Jeresano identified appellant as the shooter but there was impeachment evidence to establish Jeresano said he made it all up to gain a benefit in his federal case, then this would be material and reasonably likely to influence the judgment of the jury.

124. The Court finds that in the case at hand, there was no claim that Jeresano gave false testimony about who the shooter was; there was no testimony that Jeresano made a previous statement that he could not positively identify the Appellant in the photo array. Had that been the case, a false statement that Appellant was the shooter would be material and reasonably likely to influence the judgment of the jury.

125. The Court finds that the jury had to make a determination whether Jeresano was telling the truth or not telling the truth about the Appellant being the shooter.

126. The Court finds that the jury was not left without any evidence showing the falsity of Jeresano's statement that *"he was not promised anything for his testimony"*, and they could have determined Jeresano was not truthful and disbelieved him because of this false testimony.

127. The Court finds, however, because the jury can believe some, none, or all of a witness's

testimony, the jury could have determined that Jeresano gave false testimony but that they still believed he properly identified the shooter.

128. The Court finds that Jeresano's false testimony *(that he was not promised anything to testify in court)* is not closely tied to the veracity of his testimony identifying the shooter. Meaning, his false testimony does not permit a reasonable inference to be drawn that he had to be lying about the identity of the shooter; nor does the false testimony mean it was "reasonably likely" to influence the judgment (conviction/sentence) of the jury because the jury had a right to still believe Jeresano's testimony identifying the appellant as the shooter even though they may have believed he was impeached with evidence at trial, and even if they would have heard about the letter that was going to be written to the federal judge.

129. The Court concludes the purpose of impeachment is to attack the credibility of the witness; it does not guarantee that the witness's credibility will be totally annihilated because, once again, the determination of the weight to be given a witness's testimony is solely within the province of the jury.

130. The Court finds that even if the jury gave value to the impeachment evidence, including the letter; there was still evidence that established the veracity of Jeresano's identification of the Appellant, such as the evidence that he was able to confidently identify the Appellant from a photo array. In addition, the jury could have thought Jeresano was truthful regarding his identification because of his testimony describing how the shooter fired

into the crowd corroborated the detectives' observation of how casings were found at the scene.

131. **Therefore, the Court finds that Appellant has failed to prove Jeresano's testimony that *"Nope"*, he had not been made any promises to testify in court *(including the promise that a letter would be written to the federal judge)* was "material" such that there is a "reasonably likelihood" that this false testimony affected the jury's judgment.**

APPLICANT'S HABEAS CLAIM #3: CUMULATIVE PREJUDICE

132. The applicant avers that he "demonstrated sufficient prejudice to require habeas corpus relief because of professional misconduct[2] or ineffective assistance of counsel. Assuming *arguendo* that the Court of Criminal Appeals disagrees, the cumulative effect of the prejudice flowing from these constitutional violations requires relief." *Applicant's Writ* at 10, *Applicant's Brief* at 34-35.

133. The Court finds that the applicant fails to demonstrate any prejudice given that there was an absence of error. See Court's *Findings of Fact.*

[2] The Court notes that the applicant alleged that the State presented and failed to correct false testimony, not prosecutorial misconduct.

CONCLUSIONS OF LAW

INEFFECTIVE ASSISTANCE OF COUNSEL

1. The Court concludes that the applicant fails to demonstrate by a preponderance of the evidence that trial counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 698-700.

2. In the alternative, the Court concludes, particularly given the extensive impeachment of Jeresano by King, that the applicant fails to demonstrate by preponderance of the evidence that the outcome of the trial would have been different but for his counsel's deficient performance. *Strickland,* 466 U.S. at 698-700.

FALSE TESTIMONY

3. The Court concludes that the appellant has demonstrated by a preponderance of the evidence that the State presented false testimony. *Ex parte De La Cruz,* 466 S.W.3d 855, 867-71 (Tex. Crim. App. 2015).

4. However, the Court concludes that the applicant fails to demonstrate by a preponderance of the evidence a reasonable likelihood that the false testimony affected the judgment of the jury. *Weinstein,* 421 S.W.3d at 667-69.

CUMULATIVE PREJUDICE

5. The Court concludes that in the absence of error there is no cumulative prejudice. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999);

see Derden v. McNeel, 978 F.2d 1453, 146 (5th Cir. 1992) ("Even if the events of which Derden complains were 'errors' it cannot reasonably be said that they cumulatively so infected the trial with unfairness as to render his conviction a denial of due process.").

No. 1353181-A

EX PARTE	§	IN THE 174th DISTRICT COURT
FEANYICHI EZEKWESI UVUKANSI,	§	OF
Applicant	§	HARRIS COUNTY, TEXAS

RECOMMENDATION AND ORDER

THE COURT HEREBY RECOMMENDS THAT THE APPELLANT'S WRIT OF HABEAS CORPUS BE DENIED.

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in cause no. 1353181-A and transmit same to the Texas Court of Criminal Appeals, as provided by TEX. CRIM. PROC. CODE art. 11.07, §3(d). The transcript shall include certified copes of the following documents:

1. All of the applicant's pleadings and exhibits filed in cause no. 1353181-A, including his writ of habeas corpus;

2. All of the State's pleadings and motions filed in cause no. 1353181-A;

3. This Court's Findings of Fact, Conclusions of Law, and Order denying relief in cause no. 1353181-A;

4. Any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or the State;

5. The reporter's record for the August 6, 2018 writ evidentiary hearing and November 2, 2018 argument of counsel; and,

6. The indictment, judgment, sentence, docket sheet, and appellate record in cause number 1353181, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER ORDERED to send a copy of the Court's Findings of Fact and Conclusions of Law, including its order, to applicant's counsel: Randy Schaffer; One City Centre, 1021 Main Street, Suite 1440, Houston, Texas 77002; and counsel for the State: Joshua A. Reiss, Assistant District Attorney, Harris County District Attorney's Office, 500 Jefferson Street, 11th Floor; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT PARTIALLY ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NUMBER 1353181-A.

SIGNED this 2nd day of April, 2019.

/s/ Hazel Jones
Hazel Jones
Presiding Judge [SEAL]
174th District Court
Harris County, Texas

FILE COPY

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

[SEAL]

10/19/2016 **COA No. 01-14-00527-CR**
Tr. Ct. No. 1353181
UVUKANSI, FEANYICHI EZEKWESI **PD-0727-16**

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

Abel Acosta, Clerk

1ST COURT OF APPEALS CLERK
CHRISTOPHER A. PRINE
301 FANNIN
HOUSTON, TX 77002-7006
* DELIVERED VIA E-MAIL *

Opinion issued June 2, 2016

[SEAL]

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00527-CR

FEANYICHI EZEKWESI UVUKANSI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1353181

MEMORANDUM OPINION

A jury found appellant, Feanyichi Ezekwesi Uvukansi, guilty of the offense of capital murder.[1] Because the State did not seek the death penalty, the trial court, as statutorily required, assessed his punishment at confinement for life without parole.[2] The trial court further found that appellant used a deadly weapon,

---

[1] *See* TEX. PENAL CODE ANN. § 19.03(a)(7) (Vernon Supp. 2015).

[2] *See id.* § 12.31(a) (Vernon Supp. 2015).

namely, a firearm, in the commission of the offense. In four issues, appellant contends that the evidence is legally insufficient to support his conviction and the trial court erred in not instructing the jury on the lesser-included offense of felony murder, denying his motion to suppress evidence, and overruling his objection to a portion of the State's closing argument.

We affirm.

Background

Frazier Thompson testified that on June 20, 2012, immediately after his performance at a rap concert at The Blue Room nightclub (the "nightclub"), he walked outside into the nightclub's parking lot and towards his car, which he had valeted "right in front of the club." Within a "few seconds" of stepping into the parking lot, someone shot him in the back. Frazier, who was standing in front of the nightclub, near the valet stand, did not see the shooter. However, he knew the two other men, the complainants, Coy Thompson and Carlos Dorsey, who were shot and killed in the parking lot.[3]

Oscar Jeresano testified that on June 20, 2012, the nightclub hosted a rap concert, during which he valeted patrons' cars. He explained that "the whole night was pretty busy," "pretty, pretty hectic," and people were everywhere "coming in and out." When the

[3] In addition to the two complainants, a woman was also killed. In the instant case, the State did not accuse appellant of causing her death.

concert "let out . . . around 2:00, 2:10 [a.m.]," "a lot of people started gathering" in the parking lot, and there was "a big pile of people" "all over the parking lot." Jeresano estimated that "100 people or more" had congregated outside of the nightclub.

While Jeresano was speaking with a woman about her car, he "heard shots" fired, immediately "turned around," and saw a "flame coming out of [a] gun." He also saw approximately eighty to eighty-five percent of the face of the shooter. Jeresano focused on the shooter, who had a "determined look" on his face, like "he knew what he was going for," and "[i]t wasn't [just] a random thing." While the shooter, who held his arm "straight out" with a "gun in his hand," was moving, Jeresano "[d]odged for cover behind or to the side of a [car]" and saw "bodies drop[ ]" to the ground.

Jeresano further testified that he heard approximately fifteen shots fired in the parking lot, saw only one shooter, and "witness[ed] three people die." He noted that the shots had been fired "one after another," with "no pause [in] between them," and he did not see "anybody . . . shooting back." In other words, this was not a "shoot out" between several people. The shooter fired his gun "towards the crowd" of people outside of the nightclub, "shooting all over the place." Although Jeresano did not see "exactly where [each] bullet went," because "there w[ere] too many people" and he could not "follow" each individual bullet, he did see the shooter "shooting at the crowd" of people.

After the shooting, Jeresano met with a Houston Police Department ("HPD") officer, who showed him a photographic array containing a photograph of appellant and five other men with similar physical characteristics. He recognized the shooter in the photographic array "right away," and he was "[one] hundred percent" certain of his identification. Jeresano identified appellant as the shooter that he saw at the nightclub on June 20, 2012.

HPD Officer W. Reyes testified that on June 20, 2012, he was dispatched to the nightclub, where, upon his arrival, he saw in the parking lot, which was "packed" and "full," "a large crowd" of "over 100" people "running around frantic." "[S]hots" had been fired "all along the parking lot," indicating that the shooter was "moving" when he fired his gun, and three individuals were pronounced "deceased" at the scene. During Reyes's testimony, the trial court admitted into evidence photographs of the bodies of the two complainants where they had been slain in the parking lot.

HPD Officer W. Tompkins testified that when he arrived at the nightclub's parking lot on June 20, 2012 after the shooting, he saw a "very large amount of people." He recovered eighteen bullet "casings" from the parking lot; however, "because of the large amount of people and vehicles," it was "highly possible that [he] might have missed some."

HPD Officer C. Cegielski testified that on June 20, 2012, "[t]here [was] a concert at a club, [with] a lot of people. [When the] [c]lub . . . let out, [a] shooting

happened in the parking lot. Three people were killed at the scene." He met with Jeresano after the shooting and showed him several photographic arrays, all containing photographs of six "males of similar characteristics, age, [and] facial hair." One array contained a photograph of appellant and five other men. Jeresano "went straight to [appellant's] picture" and said "this is the guy with the gun." Jeresano also stated that "he only saw one person with a gun" that night, he looked at the shooter "face-to-face," and he heard "a lot of shots" fired, about "15 to 20." According to Cegielski, no one other than appellant was ever "identified as the shooter."

Officer Cegielski obtained a "pocket warrant" for appellant's arrest. And, following his arrest, appellant waived his legal rights and gave a statement, which Cegielski recorded. HPD officers then obtained a search warrant to view the contents of appellant's cellular telephone. Officers ultimately recovered two photographs, State's Exhibits 55 and 56, from appellant's telephone, and Cegielski identified the individuals pictured in the photographs at trial.

HPD Officer J. Brooks testified that Jeresano told HPD officers that he saw appellant "shooting," and although Jeresano did not see exactly "where [each of] the bullet[s] went," he saw "the direction of the shooting," which was "into . . . the crowd." According to Brooks, "[t]he description of where [Jeresano] said" he saw appellant "shooting" was in accord with the location of the bodies of the two complainants in the parking lot of the nightclub. Brooks also testified that the

two photographs "recovered from [appellant's] cell phone," State's Exhibits 55 and 56, were taken an hour after the shooting.

Dr. Roger Milton, an assistant medical examiner at the Harris County Institute of Forensic Sciences, testified that he performed autopsies on the bodies of the two complainants. He noted that Dorsey had "a gunshot wound to the right side of his face," with "a corresponding gunshot exit wound to the left jaw." Milton's internal examination of Dorsey showed that he,

> had a gunshot track through his upper neck and posterior or back portion of his face that perforated some major vessels in the right side of his neck. [His] internal and external carotid arteries that are high-pressure vessels that pump blood into the brain, . . . had been severed, and the bullet had fractured his jaw, went through the back of his throat and exited. . . . [H]e [also] had extensive bleeding in his lungs and his stomach, which . . . indicat[ed] . . . high-pressure blood being forced into his respiratory system, his throat, lungs, and his stomach. . . .

Milton further explained:

> The bullet entered the right, just adjacent to [Dorsey's] right jaw; and it perforated some major vessels in [his] upper neck, the internal and external carotid arteries, that supply blood to the brain and also to the soft tissue structures of the right side of [his] face. It's a high-pressure arterial system and then [his]

> blood kind of poured out into [his] neck and throat and the blood was inhaled and swallowed. And so, [Dorsey] died as a result of blood loss and as a result of respiratory compromise from [his] blood being inhaled into [his] lungs.

Milton opined that the gunshot itself did not "instantly" kill Dorsey; instead, he died from "internal bleeding," "blood loss," and "respiratory compromise," due to his lungs "fill[ing] with blood." Dorsey's death occurred slowly, "essentially like drowning or suffocating." And it is "very unlikely" that Dorsey's injuries were survivable, even if he had made it to a hospital.

In regard to Thompson, Milton testified that he had "a gunshot entrance wound [on] the upper outer aspect of [his] right hip region." The bullet that struck Thompson,

> had a very steep upward trajectory. . . . [It] entered the posterior back of [his] right hip and perforated [his] liver, [his] right kidney, and passed through [his] heart as well and then exited [his] body on the left chest. So it traveled from the lower right side of [his] body into the upper left side of [his] body.

Milton opined that Thompson's injuries were not survivable and were "consistent" with him having had "his back to the shooter" and "him leaning over or . . . being on the ground" when he was shot. Thompson also suffered a second gunshot wound on "the upper, outer right thigh," which fractured his right femur.

Sufficiency of the Evidence

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction because "there is no evidence which proves that [he] intentionally killed . . . Dorsey."

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

A person commits the offense of capital murder if he "murders more than one person . . . during the same criminal transaction." TEX. PENAL CODE ANN. § 19.03(a)(7)(A) (Vernon Supp. 2015). A person commits murder if he "intentionally or knowingly causes the death of an individual." *Id.* § 19.02(b)(1) (Vernon

2011). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a) (Vernon 2011). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b); *see also Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) ("Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death."). A person is guilty of murder if he intentionally or knowingly fires a firearm into a crowd of people and at least one of the persons in the crowd dies. *Medina v. State*, 7 S.W.3d 633, 636–37, 640 (Tex. Crim. App. 1999).

Appellant asserts that the evidence did not establish that he "had the specific intent to kill Dorsey." In other words, there is "nothing [in the record] to support an intentional killing of Dorsey" by appellant.

"Intent is almost always proven by circumstantial evidence." *Trevino v. State*, 228 S.W.3d 729, 736 (Tex. App.—Corpus Christi 2006, pet. ref'd); *see also Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) ("Direct evidence of the requisite intent is not required. . . ."); *Smith v. State*, 56 S.W.3d 739, 745 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused, and the method of committing the crime and from the nature of wounds inflicted on the victims." *Manrique v.*

State, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999). A jury may also infer knowledge from such evidence. *See Stahle v. State*, 970 S.W.2d 682, 687 (Tex. App.—Dallas 1998, pet. ref'd); *Martinez v. State*, 833 S.W.2d 188, 196 (Tex. App.—Dallas 1992, pet. ref'd).

Further, a firearm is a deadly weapon per se. TEX. PENAL CODE ANN. § 1.07(a)(17) (Vernon Supp. 2015); *Sholars v. State*, 312 S.W.3d 694, 703 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). And the intent to kill a complainant may be inferred from the use of a deadly weapon in a deadly manner. *Adanandus v. State*, 866 S.W.2d 210, 215 (Tex. Crim. App. 1993); *Watkins v. State*, 333 S.W.3d 771, 781 (Tex. App. Waco 2010, pet. ref'd). If the defendant uses a deadly weapon in a deadly manner, the inference of intent to kill is almost conclusive. *Watkins*, 333 S.W.3d at 781; *Trevino*, 228 S.W.3d at 736. And when a deadly weapon is fired at close range and death results, the law presumes an intent to kill. *Womble v. State*, 618 S.W.2d 59, 64–65 (Tex. Crim. App. 1981); *Trevino*, 228 S.W.3d at 736; *Childs v. State*, 21 S.W.3d 631, 635 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). "[T]he most obvious cases and the easiest [cases] in which to prove a specific intent to kill, are those . . . in which a firearm [is] used and [is] fired . . . at a person." *Godsey v. State*, 719 S.W.2d 578, 581 (Tex. Crim. App. 1986).

Here, Jeresano testified that June 20, 2012 was a "pretty busy" and "pretty, pretty hectic" night for the nightclub, where he was valeting cars. People were everywhere, "coming in and out" of the nightclub throughout the night. He noted that when the rap

concert at the nightclub "let out," "a lot of people started gathering" outside in the parking lot, and there was "a big pile of people" "all over the [club's] parking lot." Jeresano estimated that "100 people or more" had congregated outside of the nightclub.

Officer Reyes similarly testified that when he arrived at the nightclub, he saw "a large crowd," "over 100" people "running around frantic." He described the nightclub's parking lot as "packed" and "full." Officer Tompkins explained that there was a "very large amount of people" in the parking lot when he arrived at the scene. And Officer Cegielski testified: "There [was] a concert at a club, [with] a lot of people. [When the] [c]lub . . . let out, [a] shooting happened in the parking lot."

Jeresano further testified that while he was speaking with a woman about her car, he "heard shots" fired. When he "turned around," he saw a "flame coming out of [a] gun." Appellant, who Jeresano identified as the shooter, was facing him and had a "determined look" on his face, like "he knew what he was going for" and "[i]t wasn't [just] a random thing." Appellant held his arm "straight out" with a "gun in his hand." Jeresano noted that approximately fifteen shots were fired in the parking lot, "one [right] after another," with "no pause [in] between them." He "saw the bullets" and appellant "shooting towards the crowd" of people. Appellant was "shooting all over the place." Although Jeresano did not see "exactly where [each] bullet went," because "there w[ere] too many people" and he could not "follow" each individual bullet, he did see appellant

"shooting at the crowd." From his position, he saw "bodies drop[ ]" to the ground, and he "witness[ed] three people die." And appellant was the only shooter that Jeresano saw in the nightclub's parking lot that night.

Officer Cegielski further testified that Jeresano identified appellant as "the guy with the gun" and told him that appellant was the "one person" he saw "with a gun." Jeresano also told Cegielski that he heard "a lot of shots" fired, about "15 to 20." And Officer Brooks noted that Jeresano told HPD officers that he saw appellant "shooting," and although he did not see exactly "where [each of] the bullet[s] went," he saw "the direction of the shooting," which was "into . . . the crowd." According to Brooks, "[t]he description of where [Jeresano] said" he saw appellant "shooting" was in accord with the location of the bodies of the two complainants in the parking lot of the nightclub.

In short, the evidence presented at trial establishes that appellant fired a gun at least fifteen times, without pausing, in the direction of a large crowd of people.[4] And, the two complainants, who were *both* in the crowd of people, sustained gunshot wounds that resulted in their deaths. This evidence is sufficient to establish that appellant intentionally or knowingly caused the deaths of both of the complainants. *See Medina*, 7 S.W.3d at 637 ("Opening fire with an automatic rifle, at close range, on a group of people supports the conclusion that [defendant] acted with the specific

---

[4] In his brief, appellant concedes that "he was shooting into the crowd."

intent to kill."); *Vuong v. State*, 830 S.W.2d 929, 933–34 (Tex. Crim. App. 1992) ("[Defendant]'s use of a deadly weapon in a tavern filled with patrons supplies ample evidence for a rational jury to conclude beyond a reasonable doubt that [he] had the requisite intent to kill"); *Delacerda v. State*, 425 S.W.3d 367, 398 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("[E]vidence that [defendant] opened fire on the group of boys at relatively close range and shot at least five or six times . . . is evidence of intent to kill.").

In his brief, appellant also asserts that the State failed to establish that he intended to "solicit[ ], encourage[ ], direct[ ], aid[ ] or attempt[ ] to aid another person in shooting . . . Dorsey." *See* TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2011) ("A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. . . ."). While the trial court's charge to the jury in this case authorized conviction of appellant on a law-of-the-parties theory, the charge also authorized the jury to convict appellant as the sole actor in the murder of the two complainants. It is well-established that when a jury returns a general verdict and the evidence is sufficient to support a guilty finding under any of the theories submitted, the verdict will be upheld. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992). Having concluded that the evidence is sufficient to establish that appellant possessed the specific intent to kill both of the

complainants regardless of any law-of-the-parties considerations, we need not address appellant's law-of-the-parties argument. *Cf. Cantu v. State*, No. 13-04-490-CR, 2006 WL 3953398, at *2 n.2 (Tex. App.—Corpus Christi Dec. 21, 2006, pet. ref'd) (mem. op., not designated for publication) ("Because we conclude the evidence was legally . . . sufficient to convict [defendant] as a party to capital murder and attempted capital murder, we need not address whether the evidence was sufficient to convict appellant as a primary actor.").

Appellant also asserts that he had "absolutely no motive . . . to kill Dorsey" and this should be considered in determining whether he possessed the requisite intent to commit the offense of capital murder. Notably though, the State is not required to establish motive in order to sustain a conviction of capital murder. *See Vuong*, 830 S.W.2d at 934; *Garcia v. State*, 495 S.W.2d 257, 259 (Tex. Crim. App. 1973).

Viewing all the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have reasonably found that appellant intentionally or knowingly caused the deaths of both of the complainants. Accordingly, we hold that the evidence is legally sufficient to support appellant's conviction for the offense of capital murder.

We overrule appellant's first issue.

Lesser-Included Offense

In his second issue, appellant argues that the trial court erred in denying his "timely request for a jury instruction on the lesser-included offense of felony murder" because "[f]elony murder is a lesser-included offense of capital murder" and "some evidence exist[ed] that would [have] permit[ted] [the] jury to rationally find that . . . he [was] guilty only of the lesser offense of [felony] murder."

We review a trial court's decision not to submit a lesser-included offense instruction for an abuse of discretion. *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005); *Threadgill v. State*, 146 S.W.3d 654, 665–66 (Tex. Crim. App. 2004). And courts use a two-step analysis to determine whether a defendant was entitled to a lesser-included offense instruction. *Hall v. State*, 225 S.W.3d 524, 528, 535–36 (Tex. Crim. App. 2007); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993).

First, we determine whether the requested offense is a lesser-included offense by comparing the elements of the two offenses. *Hall*, 225 S.W.3d at 535–36; *Young v. State*, 428 S.W.3d 172, 175–76 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). Second, we determine whether some evidence exists in the record that would permit a rational jury to find that the defendant is guilty only of the lesser offense, if he is guilty at all. *Hall*, 225 S.W.3d at 536; *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d at 672–73; *Young*, 428 S.W.3d at 176. There

must be some evidence from which a rational jury could acquit the defendant of the greater offense, while convicting him of the lesser-included offense. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). We review all evidence presented at trial to make this determination. *Rousseau*, 855 S.W.2d at 673. And we may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore*, 969 S.W.2d at 8. Anything more than a scintilla of evidence entitles a defendant to an instruction on the lesser-included offense. *Hall*, 225 S.W.3d at 536.

Because the State concedes that felony murder is a lesser-included offense of capital murder, we need only determine whether the evidence would allow a rational jury to find that appellant was guilty only of the offense of felony murder. *Cf. Young*, 428 S.W.3d at 176; *see also Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999) ("[F]elony murder is a lesser included offense of capital murder."). Appellant asserts that the jury could have believed that he "intended to kill . . . Thompson (whom [he] arguably had some motive to kill)," but that "Dorsey was killed by indiscriminate shooting into the crowd" and appellant had "no intent to kill him."

A person commits the offense of felony murder if, during the commission of or attempt of a felony, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(3). The only difference between the offense of capital murder and the offense of felony murder is that capital murder

requires *the specific intent to kill*, whereas felony murder involves an unintentional killing *See Santana v. State*, 714 S.W.2d 1, 9 (Tex. Crim. App. 1986); *Fuentes*, 991 S.W.2d at 272 ("The distinguishing element between felony murder and capital murder is the *intent to kill*." (emphasis added)); *Rousseau*, 855 S.W.2d at 673. Thus, in order for appellant to be entitled to an instruction on the lesser-included offense of felony murder, "there must be some evidence that would permit a jury rationally to find" that appellant intended to commit a felony but did not intend to cause the death of Dorsey. *See Threadgill*, 146 S.W.3d at 665.

Here, contrary to appellant's assertion, the evidence at trial showed that he intentionally or knowingly caused the death of *both* of the complainants. As several witnesses testified at trial, a crowd of more than "100 people" gathered in the nightclub's parking lot after a rap concert had "let out." Jeresano explained that he "heard shots" fired and saw appellant standing with his arm "straight out," a "gun in his hand," and a "flame coming out of the gun." Appellant had a "determined look" on his face and fired approximately fifteen shots, "one [right] after another," without "paus[ing]." Appellant shot "at the crowd" and "towards the crowd" of people. Jeresano saw "bodies drop[ ]" to the ground, and he "witness[ed] three people die." Further, he saw appellant shoot in the "same" direction as where both of the complainants' "bodies were located" in the parking lot of the nightclub.

Such evidence establishes a "specific intent to kill," as required for the offense of capital murder. *See*

Medina, 7 S.W.3d at 637; *Vuong*, 830 S.W.2d at 933–34; *Delacerda*, 425 S.W.3d at 398. And given this evidence, a rational jury could not have found that appellant was guilty of only the offense of felony murder and not the offense of capital murder. *See Mohammed v. State*, 127 S.W.3d 163, 166–67 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding trial court did not err in denying requested jury instruction on lesser-included offense of felony murder where evidence showed defendant "committed an intentional killing"); *see also Salinas v. State*, 163 S.W.3d 734, 741–42 (Tex. Crim. App. 2005) (concluding "evidence did not raise the issue of felony murder" where it showed "intent to kill"); *Baker v. State*, No. 05-07-01209-CR, 2008 WL 5252451, at *15 (Tex. App.—Dallas Dec. 18, 2008, pet. ref'd) (mem. op., not designated for publication) (determining no evidence defendant "could have been found guilty of only felony murder and not of capital murder" where record showed he "intentionally shot and killed both victims").

Accordingly, we hold that the trial court did not err in denying appellant's request for a jury instruction on the lesser-included offense of felony murder.

We overrule appellant's second issue.

Suppression of Evidence

In his third issue, appellant argues that the trial court erred in denying his motion to suppress two photographs, State's Exhibits 55 and 56, obtained from his cellular telephone because the telephone was seized

from "a third person's residence" "without a warrant" and "not incident to his arrest."

We review a trial court's denial of a motion to suppress evidence under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We review the trial court's factual findings for an abuse of discretion and its application of the law to the facts de novo. *Id.* At the suppression hearing, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility, and it may choose to believe or disbelieve all or any part of the witnesses' testimony. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). When, as here, a trial judge does not make explicit findings of fact, we review the evidence in a light most favorable to the trial court's ruling. *Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). Almost total deference should be given to a trial court's implied findings, especially those based on an evaluation of witness credibility or demeanor. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.* at 447–48.

Prior to trial, appellant moved to suppress "all evidence SEIZED from [his] cell phone that was UNLAWFULLY SEIZED from the home of [a third person], where [he] was arrested." The trial court denied appellant's motion, and during trial, it admitted into evidence, over appellant's objection, State's Exhibits 55 and 56, which were obtained from appellant's cellular

telephone after HPD officers had secured a search warrant. Appellant made clear at the hearing on his suppression-motion that his complaint concerned the initial seizure of his cellular telephone by HPD officers from a third-person's residence, rather than the actual search of his telephone's contents, which occurred after they had obtained a search warrant.

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution protect against unreasonable searches and seizures. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *see State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013). A search or seizure that is conducted without a warrant issued upon probable cause is per se unreasonable subject to only a few specifically established and well-delineated exceptions. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973); *Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005); *Reasor v. State*, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000). Here, it is undisputed that HPD officers did not obtain possession of appellant's cellular telephone through a validly issued search warrant, instead it was seized, along with appellant's clothing, by officers who were executing an arrest warrant for appellant at a third-person's residence. Thus, the State had the burden to show that the seizure of appellant's cellular telephone fell within one of the exceptions to the warrant requirement. *See State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998).

Assuming, without deciding, that the warrantless seizure of appellant's cellular telephone by HPD

officers violated the Fourth Amendment and the trial court erred in denying his motion to suppress State's Exhibits 55 and 56, we must still determine whether the trial court's error was harmless.

We review the harm resulting from a trial court's erroneous denial of a motion to suppress and subsequent admission of evidence obtained in violation of the Fourth Amendment under the constitutional harmless-error standard. TEX. R. APP. P. 44.2(a); *see Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) (mandating application of Rule 44.2(a) to harm analysis of trial court's erroneous denial of motion to suppress under Fourth Amendment). This standard requires us to reverse the trial court's judgment of conviction unless we determine "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a); *see also Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008). In applying the harmless-error test, the primary question is whether there is a "reasonable possibility" that the error might have contributed to the conviction. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (internal quotations omitted).

We are directed that our harmless error analysis should not focus on the propriety of the outcome of the trial. Instead, we must calculate, as much as possible, the probable impact of the evidence 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 "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 or punishment,'" and if applicable, we may consider the nature of the error, the extent that it was emphasized by the State, its probable collateral implications, and the weight a juror would probably place on the error. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011) (quoting TEX. R. APP. P. 44.2(a)). This requires us to evaluate the entire record in a neutral, impartial, and even-handed manner and not "in the light most favorable to the prosecution." *Harris v. State*, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989) (internal quotations omitted), *disagreed with in part on other grounds by Snowden*, 353 S.W.3d at 821–22; *Daniels v. State*, 25 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Error does not contribute to the conviction or punishment if the jury's verdict would have been the same even if the erroneous evidence had not been admitted. *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007).

Initially, we note that there is ample evidence of appellant's guilt in the record, as detailed in our discussion of the background facts and appellant's legal-sufficiency challenge. During Officer Brook's testimony, the trial court admitted into evidence the two photographs, State's Exhibits 55 and 56, obtained from appellant's cellular telephone and about which he now complains. State's Exhibit 55 is a photograph of a group of eight individuals at an undisclosed outdoor location. State's Exhibit 56 is a photograph of another group of eight individuals at an undisclosed indoor

location. Brooks testified that the photographs were "recovered from [appellant's] cell phone" and were taken "an hour after the shooting."

Officer Cegielski also testified about the photographs, similarly noting that State's Exhibit 56 was "recovered" from appellant's cellular telephone and taken "[w]ithin an hour or so after the shooting." He identified seven of the eight individuals pictured in State's Exhibit 56 as Daryl Brown, Dexter Brown, Anthony Jones, Devonte Bennett, Deveon Griffin, Tarah Bradley, and Patrick Kennedy.[5] Cegielski could not identify the eighth individual, a female, and did not identify appellant as any of the individuals pictured in State's Exhibit 56. In regard to State's Exhibit 55, Cegielski testified that it was also taken "about an hour or so after the shooting." He noted that appellant appeared in the photograph along with seven other individuals, including Daryl Brown, Dexter Brown, Anthony Jones, Devonte Bennett, and Deveon Griffin.[6]

Officer Cegielski also specifically testified about an individual who was wearing "a green shirt with a white collar" in State's Exhibit 55. According to Cegielski, appellant, in his statement to HPD officers, indicated that he was wearing "a green shirt with a

---

[5] We note that there are discrepancies in the record regarding the correct spelling of the names of these individuals.

[6] We note that contrary to Officer Cegielski's testimony, Bennett, before he refused to continue testifying, initially testified at trial that he was pictured in State's Exhibit 56, but not in State's Exhibit 55. And he testified that appellant was also not pictured in State's Exhibit 55.

white collar" on the night of the shooting. However, Cegielski explained that the individual wearing "a green shirt with a white collar" in State's Exhibit 55 is Dexter Brown, not appellant. Cegielski also explained that in State's Exhibit 55, appellant is seen wearing a "white shirt with . . . red pants."

Appellant argues that the trial court's denial of his motion to suppress "resulted in constitutional error" which harmed him because the photographs "provided the State evidence which linked [him] . . . to other persons the police considered [as] suspects" and "cast doubt on [his] credibility in the story he initially gave to police." He asserts that State's Exhibits 55 and 56 "link[]" him to Bennett, who refused to testify at trial and who, as referenced by the State in its opening statement, provided a "big break" in HPD's investigation. He also asserts that the photographs link him to Dexter Brown, who, as testified to by Officer Cegielski, was an additional suspected shooter. He further complains that the State used the photographs to "impeach [his] statement to the police" and show that he "lied about what he was wearing" on the night of the shooting.[7]

In regard to appellant's assertions that State's Exhibits 55 and 56 "link[]" him to Bennett and Dexter Brown, we note that, according to Officer Cegielski,

---

[7] In his statement to HPD officers, which the trial court admitted into evidence, appellant stated that on the night of the shooting, he was wearing a "green . . . white collar shirt," "blue jeans," and "some white Chuck Taylors."

appellant is not one of the individuals pictured in State's Exhibit 56 with Bennett and Dexter Brown. Further, before refusing to continue his testimony, Bennett had already testified that he and appellant are not pictured in State's Exhibit 55 and he did not know appellant. And although Officer Cegielski did testify that he "believed that Dexter Brown was one of the . . . shooters" at the nightclub on June 20, 2012, he also testified that Jeresano did not identify Dexter Brown as the person he saw with a gun. And Jeresano similarly confirmed that it was appellant that he saw with his arm "straight out" and a "gun in his hand," "shooting towards the crowd" of people.

Further, in regard to State's Exhibit 55 in which, according to Officer Cegielski, appellant is pictured, appellant questioned Cegielski about the exhibit and elicited testimony from him confirming that both Bennett and Dexter Brown appear in the photograph with appellant. Cegielski also confirmed, in response to appellant's questions, that in State's Exhibit 55, it is Dexter Brown, not appellant, who is wearing the "green shirt" "with a white [c]ollar." In other words, it is appellant's questioning of Cegielski that "linked" him to Bennett and Dexter Brown and showed that he "'lied [to HPD officers] about what he was wearing'" on the night of the shooting. *See Leday v. State*, 983 S.W.2d 713, 717–18 (Tex. Crim. App. 1995).

Finally, to the extent that appellant's complaint centers on the State's assertion, in its opening statement, that Bennett was a "friend[]" of appellant, who

provided a "big break" in HPD's investigation,[8] we note that an opening statement is not evidence. *Powell v. State*, 63 S.W.3d 435, 440 (Tex. Crim. App. 2001) (Johnson, J., concurring); *Lopez v. State*, 288 S.W.3d 148, 171 (Tex. App.—Corpus Christi 2009, pet. ref'd); *Hitt v. State*, 53 S.W.3d 697, 710 (Tex. App.—Austin 2001, pet. ref'd). And the trial court, in its charge, instructed the jury that "[d]uring [its] deliberations in th[e] case, [it] must not consider, discuss, nor relate any matters not in evidence before [it]." *See Colburn v. State*, 966 S.W.2d 511, 510 (Tex. Crim. App. 1998) ("[W]e generally presume the jury follow[ed] the trial court's instructions. . . ."). Further, appellant did not object to any portion of the State's opening statement, and when Bennett actually testified at trial, he did not state that he saw appellant "holding a gun" or "shooting" or that he even saw appellant on June 20, 2012. In fact, he

---

[8] In regard to Bennett, the State, during its opening statement, asserted as follows:

> Following [his] talk with [Jeresano], Sergeant Cegielski then file[d] charges on [appellant]. He continue[d] to work the case, continue[d] to follow up on leads, continue[d] to look for information, for witnesses and three months later, the last big break in the case. Man named Devonte Bennett, a young man who knows the defendant, was friends with the defendant.
>
> Devonte Bennett c[a]me[ ] forward and sa[id], Yeah, I know him; and I saw him there that night. I saw him out in the parking lot before the shooting; and Devonte sa[id], I was coming out of that door with that same crowd and I hear[d] shots and I look[ed] up and there he [was], holding a gun, shooting that gun, shooting those people.

denied knowing appellant and stated that he had never seen him before.

Accordingly, we conclude beyond a reasonable doubt that the trial court's error, if any, in not suppressing the two photographs, State's Exhibits 55 and 56, obtained from appellant's cellular telephone, was harmless. *See* TEX. R. APP. P. 44.2(a).

We overrule appellant's third issue.

Closing Argument

In his fourth issue, appellant argues that the trial court erred in overruling his objection to the portion of the State's closing argument in which it stated that "a witness[,] who [did] not testify] at trial," identified appellant "as someone involved in the shooting" because the argument "interjected new and harmful facts into the proceeding[]" and was outside the scope of the record.

We review a trial court's ruling on an objection to a jury argument for an abuse of discretion. *See Cole v. State*, 194 S.W.3d 538, 546 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Proper jury argument is generally limited to: (1) summation of the evidence presented at trial; (2) reasonable deductions drawn from that evidence; (3) answers to opposing counsel's argument; and (4) pleas for law enforcement. *Wesbrook*, 29 S.W.3d at 115; *Swarb v. State*, 125 S.W.3d 672, 685 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd). To determine whether an argument properly falls within

one of the above categories, we consider the argument in light of the record as a whole. *Sandoval v. State*, 52 S.W.3d 851, 857 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

A trial court has broad discretion in controlling the scope of closing argument. *Lemos v. State*, 130 S.W.3d 888, 892 (Tex. App. El Paso 2004, no pet.). And the State, afforded wide latitude in its jury arguments, may draw all reasonable, fair, and legitimate inferences from the evidence. *Allridge v. State*, 762 S.W.2d 146, 156 (Tex. Crim. App. 1988).

Appellant specifically complains about the following statement made by the State during its closing argument:

> But then [HPD officers] got – they got a break. Dedrick Foster came forward, and he gave this defendant's name as someone involved in the shooting.

At trial, appellant objected, arguing that this statement constituted an "improper argument" because it was "outside the record" and "there[ ] [was] no evidence of that in the record." The trial court overruled appellant's objection.

To preserve a complaint for appellate review, a party must make a timely and specific objection. TEX. R. APP. P. 33.1(a)(1)(A). A party must also object each time the objectionable argument is made or his complaint is waived. *Ethington v. State*, 819 S.W.2d 854,

858–59 (Tex. Crim. App. 1991); *Wilson v. State*, 179 S.W.3d 240, 249 (Tex. App.—Texarkana 2005, no pet.).

Here, although appellant objected the first time that the State made the complained-of statement about Foster during its closing argument, he did not object when the State continued its argument and subsequently reiterated to the jury that HPD officers "got [appellant's] name from [Foster]" and "they also got the name of two other individuals that were involved in the shooting." Nor did appellant object when the State also argued that HPD officers "talked to some other people, and, you know, Dedrick Foster isn't here because he died. He is dead. He is not able to testify because he is dead." Further, in its opening statement, the State explained, without objection:

> The case then catches its first break. A man comes forward and says he has information, and based on that information the defendant is developed as a suspect. Now, that man that came forward, . . . Foster, you won't hear from him. He was killed two weeks after talking to the police.

Because appellant did not object each time that the State made the same or a similar argument regarding Foster, we hold that he has not preserved his complaint for appellate review.[9] *See Wilson*, 179 S.W.3d at

---

[9] In a footnote in his brief, appellant also complains that the State, in its opening statement, "informed the jury" "that a witness who did not testify [at trial] had told police that . . . [a]ppellant was the shooter." Appellant, however, did not object at trial to the complained-of statement and has failed to adequately brief

249 (defendant "did not object to [an] argument, which [was] very similar to the one complained-of" on appeal); *Dickerson v. State*, 866 S.W.2d 696, 699 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) ("Because [defendant] did not continue to object or make a running objection, he did not preserve error. . . .").

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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

---

his complaint on appeal. *See* TEX. R. APP. P. 33.1(a)(1)(A); *id.* 38.1(i). Accordingly, we hold that this complaint is not preserved for our review.

[SEAL] **CASE NO. 135318101010**
INCIDENT NO./TRN: 9167869262A001

THE STATE OF TEXAS	§	**IN THE 174TH DISTRICT**
	§	
v.	§	**COURT**
	§	
UVUKANSI, FEANYICHI EZEKWESI	§	**HARRIS COUNTY, TEXAS**
	§	
	§	
STATE ID NO.: TX06663916	§	

JUDGMENT OF CONVICTION BY JURY—
NON-DEATH CAPITAL

Judge Presiding: **HON. FRANK PRICE**	Date Judgement Entered: **6/20/2014**
Attorney for State: **GRETCHEN FLADER**	Attorney for Defendant: **VIVIAN KING**
Offense for which Defendant Convicted: **CAPITAL MURDER**	
Charging Instrument **INDICTMENT**	Statute for Offense: **N/A**
Date of Offense: **6/20/2012**	
Degree of Offense: **CAPITAL FELONY**	Plea to Offense: **NOT GUILTY**
Verdict of Jury: **GUILTY**	Findings on Deadly Weapon: **YES, A FIREARM**
Plea to 1st Enhancement Paragraph: ~~**N/A**~~ **ABANDONED**	Plea to 2nd Enhancement/ Habitual Paragraph: **N/A**

Findings on 1st Enhancement Paragraph: **N/A**	Findings on 2nd Enhancement/ Habitual Paragraph: **N/A**

Punished Assessed by:	Date Sentence Imposed:	Date Sentence to Commence:
COURT	**6/20/2014**	**6/20/2014**

Punishment and Place of Confinement:	**LIFE WITHOUT PAROLE, INSTITUTIONAL DIVISION, TDCJ**

THIS SENTENCE SHALL RUN CONCURRENTLY.

Fine:	Court Costs:	Restitution	Restitution Payable to:
$**N/A**	$ 529.00	$ **N/A**	☐ VICTIM (see below) ☐ AGENCY/AGENT (see below)

Sex Offender Registration Requirements apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was N/A.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:	From 7/3/2012 to 6/20/2014	From to
	From to	From to
	From to	From to

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**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Harris** County, Texas. The State appeared by her District Attorney.

Counsel/Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.
☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and **ORDERED** it entered upon the minutes of the Court.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the Director, Institutional Division, TDCJ. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

The Court **ORDERS** Defendant's sentence **EXECUTED**.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

Deadly Weapon.

The Court FINDS Defendant used or exhibited a deadly weapon, namely, A FIREARM, during the

commission of a felony offense or during immediate flight therefrom or was a party to the offense and knew that a deadly weapon would be used or exhibited. TEX. CODE CRIM. PROC. art. 42.12 §3g.

Signed and entered on June 20, 2014

X Frank C. Price
HONORABLE FRANK PRICE
JUDGE PRESIDING

[Right Thumbprint Omitted]

Ntc Appeal Filed: JUN 20 2014 Mandate Rec'd: _____

After Mandate Received, Sentence to Begin Date is: _____

Def. Received on _____ at _____ AM / PM

By: _____, Deputy Sheriff of Harris County

Clerk: J. WYCOFF