Appendix A

App. 1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20263

LEEROY CESAR CARBALLO,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

A member of this panel previously granted appellant's motion for leave to file a supplemental certificate of appealability and denied the motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration of the motion for certificate of appealability. IT IS ORDERED that the motion is DENIED.

Appendix 'A'

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20263

A True Copy
Certified order issued Mar 04, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

LEEROY CESAR CARBALLO,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas

O R D E R:

Leeroy Cesar Carballo, Texas prisoner # 1462910, has applied for a certificate of appealability (COA) to challenge the denial of his 28 U.S.C. § 2254 petition, which he filed to attack his jury trial conviction of aggravated robbery and the associated 40-year sentence of imprisonment. Carballo's motion for leave to file a supplement to his COA motion is GRANTED.

In his COA filings, Carballo raises claims of ineffective assistance of trial counsel. Specifically, Carballo claims that his trial counsel was ineffective for preventing him from testifying in the guilt-innocence phase, failing to allow him to testify in the punishment phase as to his version of the events, failing to object to the prosecutor's jury argument about his failure to testify, failing to question the victim about an inconsistent statement, failing to object to the

Appendix 'B'

prosecutor's closing argument that vouched for the credibility of the victim, and failing to attack the credibility of the victim based on his use of a controlled substance. Carballo argues that the district court erred in denying relief on the above claims without conducting an evidentiary hearing. He also contends that the district court erred by denying his motion for a stay. Carballo has abandoned the other claims presented in his § 2254 petition by failing to brief them. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If a district court has rejected the claims on their merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *see Miller-El*, 537 U.S. at 338. Where the district court denies habeas relief on procedural grounds, the petitioner must demonstrate that reasonable jurists would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

Carballo has failed to make the requisite showing. Accordingly, his COA application is DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

Appendix 'B'

Appendix E*

App. 1

UNITED STATES DISTRICT COURT — SOUTHERN DISTRICT OF TEXAS

LEEROY CESAR CARBALLO, *Petitioner,*	§	
v.	§	CIVIL ACTION NO. 4:17-CV-647
LORIE DAVIS, Director, Texas Department of Criminal Justice–Correctional Institutions Division, *Respondent.*	§	

Order of Adoption

On January 3, 2018, Magistrate Judge Stephen Wm. Smith issued a Memorandum and Recommendation (39). Petitioner has filed objections (43, 47) and two motions to stay to allow him to develop and exhaust several of his claims in state court (15, 22, 45). After considering the record and the law, the court denies the motions to stay and adopts the Memorandum and Recommendation as its Memorandum and Order. Carballo's petition for writ of habeas corpus is denied with prejudice. A certificate of appealability will not issue.

Signed April 12, 2018, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Appendix 'C'

Appendix D

App. 1

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LEEROY CESAR CARBALLO, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § §	Civil Action No. H-17-0647

MEMORANDUM AND RECOMMENDATION

This petition for writ of habeas corpus filed under 28 U.S.C. § 2254 has been referred to this magistrate judge for report and recommendation (Dkt. 9). The court recommends respondent's motion for summary judgment (Dkt. 32) be granted and the petition be denied with prejudice.

Background

Petitioner Carballo challenges his conviction for aggravated robbery with a deadly weapon. A jury found Carballo guilty as charged, and Carballo pled true to an enhancement paragraph alleging a prior aggravated robbery conviction. A jury sentenced Carballo to 40 years in prison. The First Court of Appeals for Texas affirmed the conviction. *See Carballo v. State*, 303 S.W.3d 742 (Tex. App. – Houston [1st Dist.] 2009, pet ref'd). The Texas Court of Criminal Appeals refused his petition for discretionary review and the United States Supreme Court denied his petition for certiorari. Carballo

Appendix 'D'

filed a state application for writ of habeas corpus challenging his conviction. After a lengthy delay, the Texas Court of Criminal Appeals denied his application on March 29, 2017, without written order on the findings of the trial court.

Carballo timely filed this federal petition for writ of habeas corpus on February 21, 2017. Carballo alleges four grounds for relief in his petition, the fourth being a claim for ineffective assistance of counsel with subparts (a)-(q). Respondent contends that parts of Carballo's fourth claim for relief are procedurally defaulted, and all claims are without merit.

Analysis

Carballo's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Section 2254 sets forth a highly deferential standard for reviewing state court habeas rulings. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). A habeas petitioner is not entitled to federal habeas relief on claims adjudicated on the merits in state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Ineffective assistance of appellate counsel (claim 1). Carballo's first claim is that he received ineffective assistance from his appellate counsel. This claim, like an ineffective assistance of trial counsel claim, is determined by the two-prong standard of

Appendix 'D'

App. 3

Strickland v. Washington, 466 U.S. 668, 687 (1984). *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). First, a defendant must show that his counsel's performance was "deficient" by pointing out specific errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The court's scrutiny of counsel's performance is highly deferential; the court presumes that counsel's conduct falls within the wide range of reasonable professional assistance. *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

Second, a defendant must demonstrate that his counsel's performance prejudiced his defense. "The focus here is whether a reasonable probability exists that counsel's deficient performance affected the outcome and denied [the defendant] a fair trial." *United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999). Conclusory allegations are insufficient; specific facts must be alleged. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Moreover, defense counsel's "conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997). The test on federal habeas review is whether the state habeas court's decision was contrary to or an unreasonable application of the *Strickland* standards.

Carballo contends that his appellate counsel did not cite the law accurately and did not argue effectively that the trial court erred in denying a mistrial. The state habeas court found that the appellate court followed the correct legal standards under Texas law when it ruled that the trial court did not abuse its discretion by denying the motion for mistrial.

Therefore, Carballo did not show that the results of his appeal would have been different but for his appellate counsel's alleged failure to argue the correct standards.[1] Here, Carballo has not shown that the state habeas court's decision was contrary to or an unreasonable application of federal law, or that it was based on an unreasonable determination of the facts. This claim should be denied.

Trial court error (claim 2). Carballo argues, as he did on direct appeal,[2] that the trial court erred in denying him a mistrial after the prosecutor commented during closing argument on Carballo's failure to testify. Carballo further argues that the trial court erred by not *sua sponte* allowing Carballo to testify more fully during the punishment phase of his trial.

In order to succeed on this claim, Carballo must show that the trial court error rendered the trial as a whole fundamentally unfair. This standard requires Caraballo to show a reasonable probability that the verdict would have been different without the error. *Rogers v. Lynaugh*, 848 F.2d 606, 609 (5th Cir. 1988). On federal habeas review, the court applies a harmless error standard; in other words, a petitioner must show actual prejudice. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

At trial, Carballo's counsel moved for a mistrial after the prosecutor said during closing argument: "Mr. Carballo didn't get up on the stand and tell you . . .." The trial court, after a bench conference, instructed the jury to disregard the prosecutor's comment, and denied defense counsel's motion for mistrial. The prosecutor then

[1] Dkt. 30-16 at 48.

[2] *See Carballo*, 303 S.W.3d at 747-48.

Appendix 'D'

continued his argument, saying, "Excuse me, I didn't mean to say Mr. Carballo. What I meant to say was Mr. Solis did not get on the stand . . .."[3] Carballo argues that this statement, and the denial of a mistrial, violated his right to remain silent.

On direct appeal, the court ruled that, assuming the prosecutor's comment was an impermissible comment on Carballo's failure to testify, the trial court did not abuse its discretion under the applicable version of the Mosley test. *Carballo*, 303 S.W.3d at 748. (citing *Archie v. State*, 221 S.W.3d 695, 700 (Tex. Crim. App. 2007) (discussing *Mosley v. State*, 983 S.W.2d 249, 259-60 (Tex. Crim. App. 1998))).[4]

As to his right to testify in the punishment phase, the state court held that a trial judge has no obligation to inform the defendant of his right to testify. The court further held that the trial court did not err in sustaining the prosecutor's objection to Carballo's request that he be allowed to read a prepared statement to the jury, because Carballo was not representing himself in the proceeding and there is no constitutional right to hybrid representation. *Carballo* , 303 S.W.3d at 751-53.

The state court's findings on the above issues are entitled to deference, and Carballo has not rebutted them. Carballo has not shown that the state court's conclusions are contrary to or an unreasonable application of federal law or the result of an unreasonable determination of the facts. Carballo is not entitled to relief on his claim 2.

Factual sufficiency of the evidence (claim 3). Carballo's claim that the evidence was factually insufficient to support his conviction derives from the Texas Constitution

[3] Dkt. 29-14 at 4.

[4] Under this test, the reviewing court balances three factors: (1) the severity of the misconduct; (2) the measures taken to cure the misconduct; and (3) the certainty of conviction absent the misconduct. *Archie*, 221 S.W.3d at 700.

and state law and is not cognizable on federal habeas review. *Woods v. Cockrell*, 307 F.3d 353, 358 (5th Cir. 2002). The applicable legal sufficiency standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979) asks only "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citing *Jackson,* 443 U.S. at 319). Carballo has not met his burden to show any grounds for federal habeas relief on this claim.

Ineffective assistance of trial counsel (claims 4(a) – 4(l)). Carballo contends his trial counsel was ineffective because he failed to: (a) secure the testimony of officers R.V. Gutierrez and F.E. Martinez, both of whom failed to appear after being subpoenaed; (b) call Carballo to the stand or to adequately inform him of his right to testify in the guilt/innocence trial phase; (c) allow Carballo to testify in the punishment phase; (d) object to prosecutor's comments on Carballo's failure to testify; (e) object to prosecutor's misstatement of the law during voir dire; (f) secure expert witnesses to disprove state's evidence and theory of the case; (g) object to complainant's testimony about the interior of Carballo's truck due to lack of personal knowledge; (h) impeach complainant about inconsistent statements; (i) object to prosecutor's improper argument that vouched for credibility of the complainant; (j) object to prosecutor's improper jury argument that invited the jury to speculate as to evidence not presented at trial; (k) object to lack of a proper oath, or to request that prospective jurors be given a proper oath before voir dire.

Carballo contends in claim 4(l) that the cumulative effect of these errors prejudiced his defense.[5]

Carballo has not met his burden as to either prong of the *Strickland* analysis. As to claim (a), counsel subpoenaed the witnesses and moved for a continuance.[6] In addition, because there is no evidence that the witnesses' testimony would have been favorable to his defense, he cannot show prejudice. *See Sayre v. Anderson*, 238 F.3d 631, 636 (5th Cir. 2001). As to claims (b) and (c), Carballo offers only the conclusory assertion that he wanted to testify. Counsel's affidavit, which the trial court credited, states that counsel explained the pros and cons of testifying, and the final decision was Carballo's. Carballo has not overcome the presumption that the decision not to testify was the product of reasoned trial strategy. He also cannot show that his own testimony about his version of events on the night of the robbery would have led to a reduced sentence, and thus cannot show prejudice from his counsel's trial strategy.

Claims 4(d), (e), (g), (i), (j), and (k) all allege instances when counsel failed to object to argument or evidence. Carballo cannot show that counsel's performance was deficient in this regard, or that he suffered prejudice. Counsel is not required to make frivolous objections. *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). Moreover, trial counsel lodged numerous objections during trial, including to the prosecutor's comment regarding Carballo's failure to testify, which were overruled. Carballo is not

[5] "[F]ederal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process.' " *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir.1992). Thus, claim 4(l) must be denied.

[6] Dkt. 29-14 at 1-2, 16-17.

Appendix 'D'

entitled to relief on claim 4(f) because there is no evidence the proposed expert testimony would be helpful to Carballo's defense. Claim 4(h) does not appear to be supported by the record. Trial counsel thoroughly cross-examined the complainant, and attempted to impeach his testimony based on his criminal record, his prior inconsistent statement about Carballo's gloves and his handling of the gun, and his medical condition.[7]

The state habeas court evaluated and rejected each of Carballo's ineffective assistance claims 4(a)-(l).[8] Carballo has not met his AEDPA burden to show that the state court's rulings were contrary to or an unreasonable application of federal law, or the result of an unreasonable determination of facts.

Ineffective assistance of counsel, procedural default (claims 4(m) – 4(q). Pursuant to 28 U.S.C. § 2254(b)(1)(A), "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." *See Moore v. Quarterman*, 491 F.3d 213, 220 (5th Cir.2007). Exhaustion requires that the highest court of the state have a fair opportunity to apply the controlling federal constitutional principles to the petitioner's allegations before a federal court may review them. *Smith v. Quarterman*, 515 F.3d 392, 402 (5th Cir. 2008).

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[7] Dkt. 29-13 at 49-54.

[8] Carballo contends that the state court did not address his claims 4(c) – 4(l) on habeas review. *See* Dkt. 37 at 1-5. These claims were allegedly asserted in his initial habeas application and a first amended habeas application, but not his second amended habeas application. Carballo contends that the state trial court's findings of fact and conclusions of law only address his second amended habeas application. If true, Carballo's claims 4(c) -4(l) are unexhausted and procedurally defaulted for the reasons addressed in the next section of this memorandum discussing his claims 4(m) -4(q). To the extent he did not include all of his claims in his second amended application, he did not "fairly present" such claims for review by the state's highest court. *Smith*, 515 F.3d at 400-02. Like his other unexhausted claims of ineffective assistance of counsel, he has not met his burden under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013) to excuse the default.

Petitioner's claims that were not previously brought in a prior state application would be barred from review in a second state application by the Texas abuse of writ doctrine. *Ex parte Whiteside*, 12 S.W.3d 819, 821 (Tex. Crim. App. 2000). Therefore, such claims are barred from federal review under the procedural default doctrine. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995). A petitioner must show cause and resulting prejudice to excuse his default, or that refusal to consider his claims would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991).

Carballo asserts in claims 4(m) – 4(p) of his federal petition that his trial counsel was ineffective because he failed (m) to file a motion to suppress photos of his truck; (n) to admit Carballo's medical records showing where he was shot by complainant; (o) to admit Carballo's phone records that he contends would show his truck was tampered with; and (p) to investigate and attack the credibility of the complainant due to his use of Xanax. Claim 4(q) is that the cumulative effect of these errors caused him prejudice.[9] Carballo did not assert these claims of ineffective assistance of counsel on appeal or in his state habeas proceeding.

Carballo also has not met his burden to show that any of these claims amount to a "substantial claim of ineffectiveness" sufficient to invoke the procedural default exception created by *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569

[9] "[F]ederal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process.' " *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir.1992). Thus, claim 4(q) must be denied.

U.S. 413 (2013). Carballo's allegations are wholly conclusory. The record shows no basis for the suppression of the photos, and counsel had ample opportunity to cross-examine witnesses about them.[10] The jury was fully aware that Carballo had been shot by the complainant, and therefore the medical records add nothing significant to his defense. And, there is no evidence that anything on Carballo's cell phone would have been credible, admissible evidence likely to sway a jury. In light of the significant evidence of guilt presented at trial, including the testimony of police officers and the complainant, Carballo would not be able to show *Strickland* prejudice on his defaulted allegations of ineffective assistance of counsel. Therefore, these claims of ineffective assistance of counsel should also be denied.

Carballo's request for an evidentiary hearing (Dkt. 19) is denied. *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

Conclusion and recommendation

For the reasons stated above, the court recommends that respondent's motion for summary judgment be granted and Carballo's federal petition for habeas corpus relief be denied with prejudice.

The court further finds that Carballo has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in a

[10] Dkt. 29-13 at 3-21; Dkt. 29-14 at 16-17.

procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have 14 days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on January 3, 2018.

Stephen Wm Smith
United States Magistrate Judge

Appendix E

APPLICANT LEEROY CESAR CARBALLO APPLICATION NO. WR-83,506-02

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT HEARING.

3-29-17

JUDGE DATE

Appendix 'E'

"amended/supplemented application for writ of habeas corpus" from Relator in November 2013, and, if so, to include it in the 11.07 record.

This motion for leave to file a writ of mandamus shall be held in abeyance until the Respondent has submitted the appropriate response. Such response shall be submitted within 30 days of the date of this order.

Filed: November 25, 2015
Do not publish

Appendix 'E'

Appendix F*

App. 1

CAUSE NO. 1097497-A

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
LEEROY CARBALLO, Applicant	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOLLOWING REMAND

The Court has considered the application for writ of habeas corpus, the State's Answer, the affidavit of Jack Carroll, and official court records in the above-captioned cause. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement which require an evidentiary hearing and recommends that the instant habeas application be denied for the following reasons:

FINDINGS OF FACT

1. The applicant, Leeroy Carballo, is confined pursuant to the judgment and sentence of the 179th District Court of Harris County, Texas, in cause number 1097497, a jury having found him guilty of aggravated robbery.

2. The jury assessed punishment at forty (40) years confinement in the Texas Department of Criminal Justice – Institutional Division.

3. The First Court of Appeals affirmed the applicant's conviction. *Carballo v. State*, 303 S.W.3d 742 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

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Appendix 'F'

App. 2

4. The applicant was represented at trial by Jack Carroll.

5. The applicant was represented on direct appeal by Ellis McCullough and Nicole DeBorde.

6. Trial counsel, Jack Carroll, filed an affidavit responding to the applicant's claims. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

7. The trial court finds the affidavit of Jack Carroll is credible and the facts stated therein are true.

8. In his first ground for relief, the applicant claims he was denied the effective representation of counsel on direct appeal due to appellate counsel's alleged failure to argue the applicable law when asserting that the trial court erred in denying the applicant's motion for a mistrial. *Applicant's Writ at 6.*

9. When analyzing the applicant's claim that the trial court erred in denying the applicant's motion for a mistrial, the appellate court applied the standard set out by the Texas Court of Criminal Appeals. *Carballo v. State*, 303 S.W.3d at 748-49.

10. The appellate court found that the trial court did not abuse its discretion by denying the applicant's motion for a mistrial. *Id.* at 749.

11. Regardless of what appellate counsel argued on direct appeal, the appellate court followed the test set out by the Texas Court of Criminal Appeals. *Id.* at 748.

12. The applicant fails to show harm as a result of appellate counsel's alleged failure to argue the applicable law when asserting that the trial court erred in denying the applicant's motion for a mistrial.

13. The applicant fails to show the results of the direct appeal would have been different but for counsel's alleged failure to argue the applicable law when asserting the trial court erred in denying the applicant's motion for a mistrial.

Appendix 'F'

14. In his second ground for relief, the applicant claims he was denied the effective assistance of counsel at trial due to trial counsel's (1) failure to object and preserve error to the prosecutor's improper comment on the applicant's failure to testify; (2) failure to call the applicant to testify or inform him of his absolute right to testify; and (3) failure to secure and present officers R. Gutierrez and F. Martinez. *Applicant's Writ at 8.*

15. During closing arguments, the prosecutor commented that "[the applicant] didn't get up on the stand and tell you, No, sir, pardon me--". *Carballo v. State*, 303 S.W.3d at 747.

16. After the prosecutor made the statement quoted in finding of fact #12, trial counsel asked to approach the bench and a discussion was held at the bench. *Id.*

17. The bench conference was not recorded. *Id.*

18. After the discussion at the bench, the trial court instructed the jury to disregard the last statement made by the prosecutor and denied the applicant's motion for a mistrial. *Id.*

19. After the court's instruction and denial of the applicant's motion for a mistrial, the prosecutor informed the jury that he had misspoke and meant to refer to the complainant, not the applicant. *Id.*

20. After their analysis, the appellate court found that the trial court had not abused its discretion in denying the applicant's motion for a mistrial based on the prosecutor's statement. *Id.* at 748.

21. The applicant fails to show trial counsel failed to preserve error regarding the prosecutor's alleged comment on the applicant's failure to testify.

22. Even if trial counsel failed to properly preserve error regarding the prosecutor's alleged comment on the applicant's failure to testify, the applicant fails to show harm as the trial court's denial of the applicant's motion for a mistrial was addressed on direct appeal.

Appendix 'F'

23. The trial court finds, based on the affidavit of Jack Carroll, that Carroll informed the applicant of his right to testify and that no one could prevent the applicant from testifying on his own behalf. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

24. The trial court finds, based on the affidavit of Jack Carroll, that the applicant told Carroll that he may have been interested in testifying in his own defense and asked what Carroll thought about it. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

25. The trial court finds, based on the affidavit of Jack Carroll, that Carroll explained the pros and cons of testifying to the applicant and informed the applicant that the right to testify was the applicant's and the applicant's alone. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

26. The trial court finds, based on the affidavit of Jack Carroll, that Carroll did nothing to prevent the applicant from testifying. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

27. The trial court finds, based on the affidavit of Jack Carroll, that Carroll did not threaten or coerce the applicant. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

28. The trial court finds, based on the affidavit of Jack Carroll, that Carroll did not prevent the applicant from testifying. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

29. The trial court finds, based on the affidavit of Jack Carroll, that the applicant chose not to testify on his own. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

30. The trial court finds, based on the affidavit of Jack Carroll, that Carroll answered all of the applicant's questions truthfully and to the best of Carroll's ability and told the applicant that the decision regarding whether or not to testify was ultimately the applicant's decision. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

Appendix 'F'

31. The trial court finds, based on the affidavit of Jack Carroll, that the applicant's testimony would have been that he was innocent and that he had nothing to do with the crime. *State's Writ Exhibit "A", January 13, 2017 Affidavit of Jack Carroll.*

32. The trial court finds, based on the affidavit of Jack Carroll, that Carroll does not believe the applicant's testimony would have changed the outcome of the trial.

33. The applicant fails to show Officer R. V. Gutierrez was available to testify at the applicant's trial.

34. The applicant fails to show Officer R. V. Gutierrez's testimony would have benefited the applicant at trial.

35. The applicant fails to show Officer F. E. Martinez was available to testify at the applicant's trial.

36. The applicant fails to show Officer F. E. Martinez's testimony would have benefited the applicant at trial.

CONCLUSIONS OF LAW

1. Because the applicant fails to show appellate counsel's conduct was deficient and that there is a reasonable probability the results would have been different but for counsel's deficient performance, the applicant fails to show he was denied the effective representation of counsel on direct appeal. *Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994).

2. Because the applicant fails to show trial counsel failed to object and preserve error to the prosecutor's alleged comment on the applicant's failure to testify, the applicant fails to show facts that would entitle him to relief. *Ex parte Hogan*, 556 S.W.2d 352 (Tex. Crim. App. 1977).

3. Even assuming that trial counsel failed to preserve error to the prosecutor's alleged comment on the applicant's failure to testify, the applicant fails to show harm because the appellate court considered whether or not the trial court erred in denying the applicant's motion for a mistrial based on the

prosecutor's statement.

4. Because the applicant fails to show harm as a result of trial counsel's alleged failure to preserve error, the applicant fails to show trial counsel was ineffective for failing to preserve error. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

5. Because the applicant fails to show trial counsel's advice regarding the applicant's right to testify was deficient and prejudiced the outcome of the applicant's trial, the applicant fails to show trial counsel rendered ineffective assistance. *Id.*

6. Because the applicant fails to show that Officers R. V. Gutierrez and F. E. Martinez were available to testify at trial and that their testimony would have benefited the defense, the applicant fails to show trial counsel was ineffective in failing to call these witnesses. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983).

7. In all things, the applicant fails to show he was denied the effective representation of counsel.

8. In all things, the applicant fails to show that his conviction and sentence were improperly obtained.

Accordingly, it is recommended to the Texas Court of Criminal Appeals that the instant application for writ of habeas corpus, cause number 1097497-A, be denied.

THE CLERK IS **ORDERED** to prepare a transcript and transmit same to the Court of Criminal Appeals as provided by TEX. CRIM. PROC. CODE ANN. art. 11.07. The transcript shall include certified copies of the following documents:

1. The application for writ of habeas corpus;

2. The State's Original Answer;

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3. The Court's order;

4. The affidavit of Jack Carroll, filed on January 13, 2017;

5. The appellate record in cause number 1097497 (unless previously forwarded to the Court of Criminal Appeals pursuant to a prior court order); and

6. The State's and the applicant's Proposed Findings of Fact and Conclusions of Law (if any).

THE CLERK is further **ORDERED** to send a copy of this order to the applicant, Leeroy Cesar Carballo, TDCJ ID# 01462910 – Wallace Pack Unit, 2400 Wallace Pack Road, Navasota, Texas 77868; and to counsel for the State, Jill F. Burdette, 1201 Franklin Street, Suite 600, Houston, Texas, 77002.

By the following signature, the Court adopts the State's Proposed Findings of Fact, Conclusions of Law and Order in cause no. 1097497-A.

SIGNED this 27 day of Feb., 2017.

R Roll

PRESIDING JUDGE, 179TH DISTRICT COURT
HARRIS COUNTY, TEXAS

DISTRICT COURT OF HARRIS COUNTY, TEXAS

Appendix 'F'

App. 8

CERTIFICATE OF SERVICE

The undersigned counsel certifies that I have served a copy of the State's Proposed Findings of Fact, Conclusions of Law, and Order in cause number 1097497-A to the applicant on February 17, 2017, by mail as follows:

Leeroy Cesar Carballo
TDCJ #01462910 – Wallace Pack Unit
2400 Wallace Pack Road
Navasota, TX 77868

Jill Burdette

Jill F. Burdette
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 274-5990
Texas Bar ID #24055492

Appendix 'F'

Appendix G*

P2

FILED
Loren Jackson
District Clerk
Time:
NOV 03 2010
By
Harris County, Texas
Deputy

Court of Appeals

First District of Texas

MANDATE

TO THE 179TH DISTRICT COURT OF HARRIS COUNTY, GREETINGS:

Before our Court of Appeals for the First District of Texas, on July 30, 2009, the cause upon appeal to revise or reverse your judgment between

LEEROY CESAR CARBALLO, APPELLANT

NO. 01-07-00824-CR V.

THE STATE OF TEXAS, APPELLEE

Appeal from the 179th District Court of Harris County, Texas. (Tr. Ct. No. 1097497). Panel consists of Justices Jennings, Keyes, and Higley. Opinion delivered by Justice Higley. Justice Jennings, concurring.

was determined; and therein our said Court made its order in these words:

"The cause heard today by the Court is an appeal from the judgment signed by the court below on September 26, 2007. After inspecting the record of the court below, it is the opinion of this Court that there is no reversible error in the judgment. It is therefore **CONSIDERED, ADJUDGED,** and **ORDERED** that the judgment of the court below be **affirmed.**

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Jennings, Keyes, and Higley."

WHEREFORE, WE COMMAND YOU to observe the order of our said Court of Appeals for the First District of Texas in this behalf, and in all things have it duly recognized, obeyed, and executed. NOV - 1 2010

COURT OF APPEALS OF THE STATE OF TEXAS

M. KARINNE MCCULLOUGH,
CLERK OF THE COURT

IMAGED

Appendix 'G'

18-20263.2213

App. 2

Opinion issued July 30, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00824-CR

LEEROY CESAR CARBALLO, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1097497

OPINION

The jury found appellant, Leeroy Cesar Carballo, guilty of aggravated robbery.[1]

1. *See* TEX. PENAL CODE ANN. § 29.03 (Vernon 2003).

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After finding one enhancement allegation to be true, the jury assessed punishment at 40 years in prison.

In four issues, appellant complains that (1) he received ineffective assistance of counsel during the punishment phase; (2) "the trial court erred by not sua sponte permitting appellant to testify to his version of events and by refusing to permit appellant to read his statement about the events for which he was standing trial"; (3) "the trial court erred in denying appellant's motion for mistrial after the prosecutor, in closing argument, violated appellant's state and federal constitutional right to remain silent"; and (4) the evidence was factually insufficient to support the judgment of conviction.

We affirm.

Background

On Halloween night 2006, Luis Solis drove his car to a local convenience store to purchase a beer for his cousin. When he got out of his car, Solis noticed a man—later identified as appellant—near the pay phone outside the store. As he was leaving the store, Solis heard a noise. Solis's cousin had been working on Solis's car that night, and Solis thought that the noise may be his muffler falling off his car. He went to the back of the vehicle and knelt down to check the muffler. Solis then heard appellant say to him from behind, "Nice car."

Solis stood up to say "thank you." At that point, appellant demanded Solis's car keys. Solis refused to give appellant the keys, and appellant pulled a handgun from his jacket pocket. Solis continued to refuse to hand over his keys. Appellant raised the handgun and pointed it at Solis's head. Solis grabbed appellant's arm. The gun fired and the bullet grazed Solis's head. Solis punched appellant, and appellant fired the weapon shooting Solis in his shoulder. Solis punched appellant again, and appellant shot him in the chest. The two men fell to the ground with Solis on top of appellant, and Solis grabbed the gun from appellant's open hand. The two men stood up, and Solis shot appellant twice in the region of his face and neck. Solis then saw appellant get into a pickup truck that had pulled up to the scene. Solis fell to the ground and tossed the handgun a few feet away. Solis called his wife and then 9-1-1 on his cell phone.

When the first police officer arrive, Solis told the officer that he had been robbed by a Hispanic man wearing blue and that he had seen the man leave in a pickup truck. A short time later, appellant walked into a nearby fire station and collapsed. Both Solis and appellant were taken to the hospital for treatment.

Solis was placed in a medicated coma for one month in the hospital. When he awoke, he picked appellant out of a photographic lineup.

Appellant was indicted for aggravated robbery. He did not testify during the

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guilt-innocence phase of trial, but did testify during the punishment phase. After appellant was convicted of aggravated robbery, this appeal followed.

Factual Sufficiency

In his fourth issue, appellant challenges the factual sufficiency of the evidence to support his conviction.[2]

Factual Sufficiency Standard of Review and Elements of the Offense

An appellate court can deem the evidence to be factually insufficient in two ways: (1) the evidence supporting the conviction is "too weak" to support the factfinder's verdict or (2) considering conflicting evidence, the factfinder's verdict is "against the great weight and preponderance of the evidence." *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009) (citing *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006)). The Court of Criminal Appeals has set out three rules for a court of appeals to follow when conducting a factual sufficiency review: (1) all of the evidence must be considered in a neutral light and not in a light most favorable to the explicating verdict; (2) the evidence may be found to be factually insufficient only when necessary to prevent manifest injustice; and (3) an explanation must be provided regarding why the evidence is too weak to support the verdict or why the conflicting evidence greatly weighs against the verdict. *Id.* In addition,

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[2] For purposes of clarity, we address appellant's issues out of order.

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when conducting a factual-sufficiency review, a court of appeals must defer to the jury's findings *Id.* (citing *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997)).

A person commits robbery if, in the course of committing theft, as defined in Chapter 31, and with intent to obtain or maintain control of property, he, inter alia, intentionally or knowingly places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a) (Vernon 2003). Theft is the unlawful appropriation of property with the intent to deprive the owner of the property. TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 2008). A person commits aggravated robbery when he commits robbery as defined in section 29.02, and he uses or exhibits a deadly weapon. TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 2003).

Analysis

In conducting a factual sufficiency review, we must consider the most important evidence that the appellant claims undermines the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003). Here, appellant contends that the testimony of the complaining witness, Luis Solis, was not credible. At trial, appellant's defensive theory was that Solis had been the aggressor, not appellant.

Appellant points to Solis's own testimony that he had a criminal history of burglary and family-violence assault. At the time of trial, Solis testified that he was

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on deferred adjudication community supervision for burglary. He acknowledged that the State had filed a motion to revoke his deferred adjudication community supervision based on a pending family-violence assault indictment in which Solis was alleged to have assaulted his common-law wife. Solis admitted that he had also been previously prosecuted for at least one other family-violence assault.

Appellant also contends that the substance of Solis's testimony is not credible. Appellant asserts that "[Solis's] story stretches credulity and would be difficult to believe if it had been told by a person with no history of deceit."

Appellant first takes issue with Solis's testimony that he went to the convenience store to purchase a beer for his cousin, who had been making repairs to Solis's car. Appellant points out that "the car went with [Solis] to the store, and the cousin did not." Appellant speculates that it is more likely that Solis purchased the beer for himself, but could not admit to this because alcohol consumption is a violation of the terms of his community supervision.

Appellant points out that Solis's injuries from being shot twice by appellant were extensive and life-threatening. Appellant asserts that Solis's testimony that he fought back against appellant and gained control of the gun after sustaining such serious injuries is not plausible. Appellant contends that it is more likely that Solis's "wounds occurred after Appellant's [wounds] and that [Solis], in all likelihood, was

the initial aggressor."

Appellant asserts that the "ultimate location of the gun's recovery also suggests [Solis] was the aggressor." Solis testified that appellant shot him, he hit appellant, the two men fell to the ground, Solis gained control of the gun, shot appellant, appellant staggered to a waiting truck, Solis collapsed to the ground, and then Solis tossed the gun a few feet away. Appellant asserts that Solis's testimony "makes little sense" because "[a] victim in the wake of a terrifying, brutal robbery would not take pains to separate himself from his only means of defense." Appellant continues that "[i]t makes far more sense that Appellant, after surviving the complainant's attack, sought to get away from the disabled, though still dangerous, complainant, and, having no use for the weapon, dropped it at a distance from [Solis] as Appellant entered his own . . . vehicle to flee."

Appellant also notes that appellant was employed at the time of the robbery but that Solis was not. Appellant asserts that Solis "would have been more desperate for money and more tempted to steal."[3]

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[3] Appellant cites his own testimony at the punishment phase as support for his factual sufficiency challenge. We cannot consider the cited testimony. We are limited in our factual-sufficiency review to the evidence introduced during the guilt-innocence phase of the trial. *See Barfield v. State*, 63 S.W.3d 446, 450 (Tex. Crim. App. 2001) (noting that in bifurcated jury trial on plea of not guilty, "evidence that is introduced at the punishment stage of a trial can have little, if any, effect on the force of the evidence on the issue of guilt" and therefore "our consideration of the evidence is

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The only direct evidence offered during the guilt-innocence phase of trial regarding what actually occurred between Solis and appellant was Solis's testimony. Not only did Solis give a detailed account of what actually happened, he also denied on cross-examination that he was the aggressor on the night in question. In other words, the determination of appellant's guilt boiled down to whether the jury found Solis's testimony credible. Appellant does not cite an objective basis in the record to show that the great weight and preponderance of the evidence contradicts the jury's verdict. Rather, the evidence cited and argument offered by appellant in support of his factual-sufficiency challenge pertains to Solis's credibility.

We afford almost complete deference to a jury's determination based on an evaluation of credibility. *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). A jury may choose to believe all, some, or none of the testimony presented. *Id.* at 707. The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.* Here, the jury resolved the issues of weight and credibility in favor of the State's theory that appellant was the aggressor and against appellant's theory that Solis was the aggressor. We defer to that determination. *See id.*

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necessarily limited to that evidence before the jury at the time it rendered its verdict of guilt").

After reviewing the evidence in a neutral light, we conclude that the evidence supporting the conviction is not too weak to support the jury's verdict, nor is the jury's verdict against the great weight and preponderance of the evidence. We hold that the evidence is factually sufficient to support appellant's conviction for aggravated robbery.

We overrule appellant's fourth issue.

Denial of Motion for Mistrial

In his third issue, appellant contends, "The trial court erred in denying appellant's motion for mistrial after the prosecutor, in closing argument, violated appellant's state and federal constitutional right to remain silent."

During closing argument, the State responded to appellant's argument that Solis was the aggressor. The prosecutor argued,

> Now, let's talk about what did happen in this case. You've got a guy who, on Halloween night, is shot. He's coming to get beer. He comes in to buy a beer. I don't know what would have made him so outraged between then and the beer that he would decide to attack somebody. But anyway, he goes in, he buys beer. He comes back out. He's looking at the muffler on his car. They've just been working on the car. He's looking at a muffler on the car, making sure they've put it back on right. Bends down, looks at the muffler, Hey, nice car. Give me the keys. Tells you he turned around, thought the guy was joking, looked at him.
>
> No, seriously, the guy shows him the gun. And you bet—you bet when the guy showed him the gun and you—part of your job in this case is to evaluate the witnesses' credibility. Mr Carballo [appellant] didn't

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18-20263-2222

get up on the stand and tell you, No, sir, pardon me—

[Defense counsel]: Your Honor, may we approach the bench?

At that point, a discussion was held at the bench, but was not recorded. Following the discussion, the trial court told the jury: "Ladies and gentleman, you're instructed to disregard the last comment by the prosecutor." The defense then moved for a mistrial, which the trial court denied.

The prosecutor then continued,

> Excuse me. I didn't mean to say Mr. Carballo. What I meant to say was Mr. Solis did not get on the stand; and that's what I meant to say, was Solis instead of Carballo. Mr. Solis did not get on the stand and say, you know, I told him—excuse me—I'm sorry, sir. No. He told you exactly what he said. He told you the truth. He didn't paint the picture, try to put himself out to be any more of an angel than he was in this situation. A guy showed him a gun; and he said, Back the fuck off or I'll kick your ass. He didn't come up here and try to paint any other picture. He told you exactly what happened.

On appeal, appellant complains that the prosecutor's remark that "Mr Carballo didn't get up on the stand and tell you" was an improper comment on appellant's failure to testify during the guilt-innocence phase. Appellant correctly points out that a comment on a defendant's failure to testify violates a defendant's state and federal constitutional rights against self-incrimination and the provisions of Texas Code of Criminal Procedure article 38.08. U.S. CONST. amend. V; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 2005). A prosecutor's comment

amounts to an impermissible comment on a defendant's failure to testify only if, when viewed from the jury's standpoint, the comment is manifestly intended to be, or is of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001).

Even assuming that the prosecutor's comment was an impermissible comment on appellant's failure to testify, the trial court did not err by denying appellant's motion for mistrial. A mistrial is an extreme remedy for prejudicial events occurring during the trial process. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). When the trial court sustains an objection raised on the basis of improper jury argument and instructs the jury to disregard, but denies a defendant's motion for a mistrial, we review the trial court's decision to deny a mistrial under an abuse of discretion standard. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *see also Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004).

The Court of Criminal Appeals has determined that the appropriate test for determining whether a trial court abused its discretion by denying a motion for a mistrial is a tailored version of the *Mosley* test. *See Archie*, 221 S.W.3d at 700; *Hawkins*, 135 S.W.3d at 77 (discussing *Mosley v. State*, 983 S.W.2d 249, 259–60

(Tex. Crim. App. 1998)). To determine whether the trial court abused its discretion by denying the mistrial, we balance three factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *See Archie*, 221 S.W.3d at 700.

In analyzing the first factor, it appears from record that the prosecutor did not deliberately refer to appellant's failure to testify during the guilt-innocence phase. Rather, the reference to appellant was inadvertent. When read in context, it is apparent that the prosecutor had intended to refer to "Mr. Solis," but misspoke and said "Mr. Carballo." In addition, the prosecutor's comment was brief and not repeated. Although the nature of the constitutional right affected by the prosecutor's remark was serious, the prejudicial effect was lessened by the absence of flagrancy and persistency. *See Perez v. State*, 187 S.W.3d 110, 112–13 (Tex. App.—Waco 2006, no pet).

A review of the second factor reveals that curative measures were taken. The trial court instructed the jury to disregard the prosecutor's comment. The jury charge also instructed the jury that it could not consider, for any purpose, appellant's decision not to testify. Any harm resulting from the improper comment was further

cured when the prosecutor corrected himself and clarified that he had intended to refer to Mr. Solis and not to appellant.

In most circumstances, an instruction to disregard improper argument is considered a sufficient response by the trial court. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Error in a prosecutor's improper jury argument concerning a defendant's failure to testify may be cured by an instruction by the trial court to disregard the comment. *See Longoria v. State*, 154 S.W.3d 747, 763–64 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd); *Linder v. State*, 828 S.W.2d 290, 300 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). Moreover, a prosecutor's self-corrective action is a relevant consideration in determining harm. *See Hawkins*, 135 S.W.3d at 84.

"[T]he . . . presumption that an instruction [to disregard] generally will *not* cure comment on failure of the accused to testify . . . has been eroded to the point that it applies only to the most blatant examples. Otherwise, the Court has tended to find the instruction to have force." *Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995) (quoting *Waldo v. State*, 746 S.W.2d 750, 753 (Tex. Crim. App. 1988)). In light of the brevity of the remark at issue and its inadvertent nature, nothing in the record shows the comment was so "blatant" that it would have rendered an instruction to disregard ineffective. *See Moore v. State*, 999 S.W.2d 385, 405–06 (Tex. Crim.

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App. 1999).

Finally, considering all the evidence, the certainty of appellant's conviction absent the allegedly improper comment was great. Solis's testimony regarding the events surrounding the robbery was detailed and more than sufficient to support appellant's conviction. As discussed in the preceding section, the jury, as final arbiter of the weight and credibility of the evidence, believed Solis's testimony and rejected appellant's defensive theory that Solis was the aggressor. We conclude that the certainty is high that appellant would have been convicted regardless of the complained-of comment.

Balancing the three *Mosley* factors, we hold that the trial court did not abuse its discretion by denying appellant's motion for mistrial. We overrule appellant's third issue.

Ineffective Assistance of Counsel

In his first issue, appellant contends that he "received ineffective assistance of counsel as his trial counsel did not abide by his request to testify on his own behalf in the punishment phase of trial."

As mentioned, appellant did not testify during the guilt-innocence phase of trial, but did testify during the punishment phase. In his brief, appellant acknowledges that, on direct examination, defense counsel "questioned [him] about

his criminal history, his previous confinement, his home life since imprisonment, his work history, his difficult childhood, his schooling, his parents, his siblings, his children, and the injuries that he sustained during the robbery for which he is standing trial." The crux of appellant's ineffective of counsel claim is that "defense counsel never asked Appellant what actually happened during the robbery for which Appellant had just been convicted."

On cross-examination, when asked whether he accepted responsibility for the robbery, appellant responded that he had pleaded not guilty to the offense. The State asked appellant whether he was saying that the jury "got it all wrong" with respect to its finding of guilt. Appellant responded that because he had "failed to testify" in the guilty-innocence phase, "the jury never got to hear my side of the story." He said the jury only "heard Mr. Luis Solis's story of the facts of his angles of where it happened of what he said happened. No one else saw what happened, and only me and Mr. Luis know exactly what happened."

On further questioning, appellant stated that "I did not rob Mr. Luis Solis." Appellant asked the prosecutor, "[W]ould you like to hear my version of the story? Is that possible? I never had a chance." After the prosecutor asked appellant a few more questions, appellant asked, "[Y]ou want me to explain to you exactly everything, my statement of what happened that night?" The prosecutor replied,

"You can—your lawyer will have you on redirect, and he can go through it if that's what you guys want to do."

After the prosecutor finished his cross-examination of appellant, defense counsel indicated that he had no further questions. The trial court then told appellant that he could "stand down." At that point, the following exchange occurred:

> [Appellant]: I want to see if I can read something to the jury. Is this the last I'll be able to talk to them?
>
> The Court: Yes. What are you asking?
>
> [Appellant]: I asked my lawyer if I could read a letter to the jury.
>
> [The prosecutor]: Judge, I'm going to object to him reading. First of all, that invades the province of the jury. Second of all, I'd like to see a proffer of that before we know what's going on, what's about to be—
>
> The Court: You have a copy of it? How many pages?
>
> [Appellant]: It's just this right here and this part right here, this page right here.
>
> [Defense counsel]: The prosecution objected to it and I have nothing to say to the objection.
>
> The Court: All right. Objection is sustained unless you want to continue this.
>
> [The prosecutor]: I mean—
>
> The Court: Are you opposed to him reading it?
>
> [The prosecutor]: I have no problem with him testifying.

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The Court: Testifying is different from reading a statement.

[The prosecutor]: Yes, Judge, we're opposed to him reading from the statement.

The Court: All right. Objection is sustained.

Appellant contends that he received ineffective assistance of counsel during the punishment phase because defense counsel did not question him about his own version of the events on the night in question. Appellant correctly points out that a criminal defendant has a fundamental constitutional right to testify in his own defense. *Johnson v. State*, 169 S.W.3d 223, 232 (Tex. Crim. App. 2005). He asserts that he had "a fundamental right" to testify regarding "his conduct in the charged offense." Appellant contends that by failing to ask him "[w]hat happened on the night in question," defense counsel "effectively denied Appellant his fundamental constitutional right to 'be heard' and to 'present a complete defense.'" Appellant further contends that had he "been given an opportunity to explain his conduct on the night of the burglary [sic], there is a reasonable probability that the jury would have believed Appellant and the resulting punishment would have likely been different."

Allegations of ineffective assistance of counsel must be firmly founded in the record. *Bone v. State*, 77 S.W.3d 828, 833, 834 n.13 (Tex. Crim. App. 2002). To prove ineffective assistance of counsel, appellant must show by a preponderance of

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the evidence that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that the result of the proceeding would have been different but for the deficient performance of counsel. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

A failure to make a showing under either *Strickland* component defeats a claim of ineffective assistance of counsel. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). If an appellant fails to prove the second "prejudice" component, we need not address whether counsel's performance was deficient. *See Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991).

Here, appellant has not satisfied the second *Strickland* component. More precisely, appellant has not shown that there is a reasonable probability that the result of the punishment proceeding would have been different had he been permitted to testify about the events surrounding the offense. *See Johnson*, 169 S.W.3d at 239–40. Appellant did not file a motion for new trial, and the record does not contain the substance of the testimony that appellant claims he would have given on redirect questioning by his defense counsel. Thus, it is not possible to determine whether the result of the punishment proceeding would have been different if defense counsel had questioned appellant regarding his version of the events. *See Ex parte McFarland*,

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163 S.W.3d 743, 758 (Tex. Crim. App. 2005) (concluding that defendant cannot show prejudice from counsel's failure to call witnesses absent evidence that witnesses were available to testify at trial and that their testimony would have been favorable).

We further note that, on cross-examination by the State, appellant indicated that he did not "rob" Solis. We can reasonably infer from this testimony that, had defense counsel questioned appellant on redirect, appellant would have further denied committing the offense and would have testified that Solis was the aggressor. Such denial of responsibility would not have been beneficial to appellant. To the contrary, during the punishment phase, a jury expects a defendant to take responsibility and to show remorse for the offense for which he has been found guilty. If appellant had further denied guilt, the jury, irritated by appellant's failure to take responsibility, likely may have imposed a harsher sentence on appellant. *See Johnson*, 169 S.W.3d at 240.

We conclude that appellant has not shown by a preponderance of the evidence that there is a reasonable probability that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Accordingly, we hold that appellant has not demonstrated that he received ineffective assistance of counsel during the punishment phase of trial.

We overrule appellant's first issue.

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Appellant's Right to Give Certain Testimony or to Read a Statement

In his second issue, appellant contends that "the trial court erred by not sua sponte permitting appellant to testify to his version of events and by refusing to permit appellant to read his statement about the events for which he was standing trial."

Appellant first contends that the trial court had a sua sponte duty to act in some manner to ensure that appellant was permitted to testify regarding his version of the events surrounding the robbery. Appellant acknowledges that the Court of Criminal Appeals has held that the *Strickland* ineffective assistance of counsel test provides the appropriate framework for addressing an allegation that the defendant's right to testify was denied by his defense counsel. *See Johnson*, 169 S.W.3d at 235. Appellant also acknowledges that "to avoid the requirements of *Strickland*, the defendant's complaint must reveal error attributable to the court and not simply to defense counsel." *See id.* at 232. Appellant contends that his complaint reveals such error.

Relying on the general legal principles that a defendant has the right to testify in his own defense and has the right to a fair trial, appellant contends that the trial court had a duty to sua sponte act to ensure that appellant was permitted to testify about his version of the events. Appellant asserts that it was apparent to the trial

court that defense counsel was refusing to question appellant regarding the events surrounding the offense, despite appellant's obvious desire to provide such testimony. Appellant argues that the trial court erred when it did not sua sponte intervene to permit appellant to give this testimony.

Appellant's reasoning is flawed. This is not a case in which the trial court prevented appellant from testifying either in whole or in part. Instead, it is a case in which appellant's counsel chose, presumably for strategic reasons, not to question appellant about the events surrounding the offense.

To conclude that the trial court erred by failing to require defense counsel to question appellant about the events would be tantamount to concluding that the trial court had a duty to interfere in the defense's trial strategy and to inject itself into the attorney-client relationship. Such a position is untenable and rife with conflict.

Appellant's complaint on appeal does not implicate "an error attributable to the court," rather it involves an alleged failing of defense counsel. *See id.* at 232. With no error attributable to the trial court, *Strickland*, as noted above, provides the appropriate framework for addressing appellant's allegation that his desire to give certain testimony was denied by defense counsel. *See id.* at 235. We conclude that appellant has not demonstrated that the trial court erred when it did not sua sponte act to enable appellant to testify regarding the events surrounding the offense.

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Appellant further contends that the trial court erred "by refusing to permit appellant to read his statement about the events for which he was standing trial." Appellant again relies on his constitutional right to testify on his own behalf. As mentioned, the State objected to appellant's request to read a statement to the jury. The trial court sustained the objection.

By his request to read a statement, appellant was asking to represent himself during part of the punishment proceeding, but not the entire proceeding. In other words, appellant was seeking permission for hybrid representation. Although a trial court has discretion to allow it, a defendant has no constitutional right to hybrid representation. *See Scarbrough v. State*, 777 S.W.2d 83, 92 (Tex. Crim. App. 1989); *Landers v. State*, 550 S.W.2d 272, 280 (Tex. Crim. App. 1977). Thus, it was not error for the trial court to sustain the State's challenge to appellant's reading of the statement to the jury. *See Landers*, 550 S.W.2d at 280.

Moreover, neither the United States Supreme Court nor the Texas Court of Criminal Appeals has held that a defendant has a constitutional right to read an unsworn statement to the jury free from cross-examination. *See Moore v. State*, No. 74,059, 2004 WL 231323, at *6 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication) (citing *United States v. Hall*, 152 F.3d 381, 396 (5th Cir. 1998) *abrogated on other grounds by United States v. Martinez-Salazar*, 528 U.S. 304, 120

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S. Ct. 774 (2000)). To the contrary, a testifying defendant is subject to the same rules governing examination and cross-examination as any other witness. *See Felder v. State*, 848 S.W.2d 85, 99 (Tex. Crim. App. 1992).

Appellant has not demonstrated that the trial court erred when it did not intervene to allow appellant to testify regarding his version of the events surrounding the offense. Appellant also has not shown that the trial court erred by sustaining the State's objection to appellant's reading of a statement to the jury.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Keyes, and Higley.

Justice Jennings, concurring.

Publish. *See* TEX. R. APP. P. 47.2(b).

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Opinion issued July 30, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00824-CR

LEEROY CESAR CARBALLO, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1097497

CONCURRING OPINION

Against the expressly stated decision of appellant, Leroy Cesar Carballo, his trial counsel, during the punishment phase of trial, failed to question appellant as a

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witness before the jury about "the events surrounding" the offense of which he was accused. There can be no sound trial strategy in an attorney unilaterally overruling his client's decision to testify in his own defense, an absolute right under the United States Constitution and the Texas Constitution. *See* U.S. CONST. amends. V, VI, XIV; TEX. CONST. art. I, § 10. This Court's conclusion to the contrary in *Agosto v. State*, No. 01-08-00319-CR, 2009 WL 566334, at *2 (Tex. App.—Houston [1st Dist.] Mar. 5, 2009, no pet. h.), is in serious error. Accordingly, although I join the majority opinion, I write separately to address this Court's error in *Agosto*.

As stated by the United States Supreme Court, "it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708 (1987). As explained in *Rock*:

> The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." . . . The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony. . . .
>
> The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. . . . Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," . . . is a right to testify himself,

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should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony.

. . . .

. . . [T]he Sixth Amendment "grants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"

Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," . . . , is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. . . . th[is] Court [has] stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."

483 U.S. at 51–53, 107 S. Ct. 2708–10 (citations omitted).

Likewise, the Texas Constitution guarantees every person accused of a crime "the right of being heard by himself or counsel, or both . . . ." TEX. CONST. art. I, § 10. The Texas Court of Criminal Appeals has also recognized that an accused's right to testify on his own behalf is "fundamental" and "personal" to the accused.

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Johnson v. State, 169 S.W.3d 223, 232 (Tex. Crim App. 2005). In *Johnson*, the court stated that "defense counsel shoulders the primary responsibility to inform the defendant of his right to testify, including the fact that the *ultimate decision belongs to the defendant*." *Id.* at 235 (emphasis added). In fact, the Texas Disciplinary Rules of Professional Conduct clearly state that "a lawyer shall abide by a client's decision" as to "whether the client will testify." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(3).

In *Agosto*, defense counsel, after the defendant had been cross-examined by the State and stated his desire to be able to give his testimony "about how things really were," unilaterally "chose not to" ask the accused about his version of events. 2009 WL 566334, at *2, *4. Although this Court, citing *Johnson*, recognized that an accused's right to testify is "fundamental and personal" to the accused, it, regardless, held that defense counsel's omission did not fall below a reasonable level of professional assistance. *Id.* at *2–3; *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). This Court's holding in *Agosto*, standing in contrast as to how the Texas Court of Criminal Appeals acted in *Johnson*, is in serious error.

In *Johnson*, the Texas Court of Criminal Appeals actually held that when a defense counsel's conduct deprives an accused of his constitutional right to testify, "this type of claim is properly characterized as one of ineffective assistance of

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counsel and that the usual analysis of prejudice under *Strickland v. Washington* applies." 169 S.W.3d at 225; *see Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (requiring two-step analysis whereby appellant must show that (1) counsel's performance fell below objective standard of reasonableness and (2) but for counsel's unprofessional error, there is reasonable probability that result of proceedings would have been different.). The court in *Johnson* did not, as this Court did in *Agosto*, address the issue under the first prong of *Strickland*. Rather, the Texas Court of Criminal Appeals explained that the denial of a defendant's right to testify by his trial counsel "is the type of *violation* that can be subjected to a harm/prejudice inquiry." *Johnson*, 169 S.W.3d at 239 (emphasis added). Obviously, an attorney's unilateral decision to overrule his client's decision to testify, i.e., to relate his version of events to the fact-finder, violates the client's constitutional right to testify on his own behalf. Thus, the Court of Criminal Appeals proceeded straight into its harm analysis under the second prong of *Strickland*.

Here, we correctly do likewise, and appellant's ineffective assistance claim fails under the second prong of *Strickland*. Given the record before us, appellant did not chose to testify until the punishment phase of trial. The jury had already found him guilty of the offense, and, as explained by the court in *Johnson*, appellant's testimony "could have hurt him at the punishment stage because of its tendency to

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show that, even at the time of trial, he refused to accept his share of the blame for what [had] happened." *Id.* at 240. Appellant did have the right to testify about the "events surrounding" the offense in the punishment stage of trial. However, it was too late to undo the jury's finding of guilt, and such testimony was more likely to have harmed appellant than to have helped him.

In sum, I agree that appellant has failed to demonstrate that he was actually harmed by his trial counsel's failure to abide by his decision to testify. However, defense counsel's unilateral decision to override appellant's right to testify about the "events surrounding" the offense in the punishment stage of trial fell below a reasonable level of professional assistance. This Court, having previously held to the contrary, should now overrule *Agosto*.

Terry Jennings
Justice

Panel consists of Justices Jennings, Keyes, and Higley.

Justice Jennings, concurring.

Publish. *See* TEX. R. APP. P. 47.2(b).

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