IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 21, 2020
Lyle W. Cayce
Clerk

No. 19-40225

LARRY MICHAEL MAPLES,

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 Eastern District of Texas
USDC No. 6:17-CV-560

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:*

Larry Michael Maples, Texas prisoner # 1965775, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application challenging his conviction of capital murder. He contends that the district court erred by dismissing on the merits and without holding an evidentiary hearing on claims that (1) his trial counsel rendered ineffective assistance by (a) failing to hire a ballistics expert or a medical expert and (b) advising Maples

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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not to testify at trial, and (2) his trial and appellate counsel rendered ineffective assistance by failing to mount a defense based on sudden passion.

To obtain a COA with respect to the denial of a § 2254 application, a prisoner 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). If a district court has rejected a claim on its 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. Maples fails to make the necessary showing. To the extent that he requests a COA regarding the district court's denial of an evidentiary hearing, we construe his motion as a direct appeal of that issue, *see Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016), and affirm. *See Cullen v. Pinholster*, 563 U.S. 170, 185-86 (2011).

Accordingly, Maples's motion for a COA is DENIED, and the district court's denial of an evidentiary hearing is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

LARRY M. MAPLES, #1965775	§	
VS.	§	CIVIL ACTION NO. 6:17cv560
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

The Court having considered Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that Petitioner's case is **DISMISSED** with prejudice.

So **ORDERED** and **SIGNED February 22, 2019.**

Ron Clark

Ron Clark, Senior District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LARRY M. MAPLES, #1965775	§	
VS.	§	CIVIL ACTION NO. 6:17cv560
DIRECTOR, TDCJ-CID	§	

MEMORANDUM OPINION ADOPTING THE REPORT
OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Larry Michael Maples, proceeding *pro se* and *in forma pauperis*, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his Van Zandt County conviction. The cause of action was referred to the United States Magistrate Judge, the Honorable John D. Love, for findings of fact, conclusions of law, and recommendations for the disposition of the petition.

I. Procedural Background

A jury convicted Maples of capital murder and he was sentenced to life imprisonment without the possibility of parole. Maples filed a direct appeal, and the Twelfth Court of Appeals affirmed his conviction. *See Maples v. State*, 2016 WL 3475334 (Tex.App.—Tyler 2016, pet. ref'd) (unpublished). The Texas Court of Criminal Appeals refused his petition for discretionary review in November 2016. Maples then filed a state application for a writ of habeas corpus in June 2017, which was denied by the Texas Court of Criminal Appeals on the findings of the trial court. He then filed this timely federal petition in October 2017.

II. Maples' Federal Habeas Claims

Maples argued that his constitutional rights were violated through his counsel's ineffectiveness. Specifically, he maintained that counsel was ineffective by (1) failing to hire/consult with a ballistics or reconstruction expert; (2) failing to hire a medical expert to

Appendix B

challenge the State's autopsy findings; (3) advising him not to testify; and (4) failing to build a defense surrounding a "sudden passion." Upon order of the Court, Respondent filed a response to Maples' petition. Respondent insisted that counsel was not ineffective and that Maples' claim concerning a potential "sudden passion" defense is unexhausted. Maples filed a reply to the response.

Judge Love issued a Report, (Dkt. #22), recommending that Maples' habeas petition be dismissed with prejudice. Judge Love also recommended that Maples be denied a certificate of appealability *sua sponte*. Maples has filed timely objections, (Dkt. #24).

III. Legal Standards

1. Federal Habeas Review

The role of federal courts in reviewing habeas corpus petitions filed by state prisoners is exceedingly narrow. A prisoner seeking federal habeas corpus review must assert a violation of a federal constitutional right; federal relief is unavailable to correct errors of state constitutional, statutory, or procedural law unless a federal issue is also present. *See Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993); *see also Estelle v. McGuire*, 503 F.3d 408, 413 (5th Cir. 2007) ("We first note that 'federal habeas corpus relief does not lie for errors of state law.'") (internal citation omitted). When reviewing state proceedings, a federal court will not act as a "super state supreme court" to review error under state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007).

Furthermore, federal habeas review of state court proceedings is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Under the AEDPA, which imposed a number of habeas corpus reforms, a petitioner who is in custody "pursuant to the judgment of State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established 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 proceedings.

28 U.S.C. § 2254(d). The AEDPA imposes a "highly deferential standard for evaluating state court rulings," which demands that federal courts give state court decisions "the benefit of the doubt." *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted); *see also Cardenas v. Stephens*, 820 F.3d 197, 201-02 (5th Cir. 2016) ("Federal habeas review under the AEDPA is therefore highly deferential: The question is not whether we, in our independent judgment, believe that the state court reached the wrong result. Rather, we ask only whether the state court's judgment was so obviously incorrect as to be an objectively unreasonable resolution of the claim."). Given the high deferential standard, a state court's findings of fact are entitled to a presumption of correctness and a petitioner can only overcome that burden through clear and convincing evidence. *Reed v. Quarterman*, 504 F.3d 465, 490 (5th Cir. 2007).

2. Ineffective Assistance of Counsel

To show that trial counsel was ineffective, Maples must demonstrate both deficient performance and ensuing prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). In evaluating whether an attorney's conduct was deficient, the question becomes whether the attorney's conduct fell below an objective standard of reasonableness based on "prevailing norms of practice." *See Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2016).

Moreover, to establish prejudice, the petitioner must show that there is a reasonable probability that—absent counsel's deficient performance—the outcome or result of the proceedings would have been different. *Id.*; *see also Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687)). It is well-settled that a "reasonable probability" is

one that is sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 694. Importantly, the petitioner alleging ineffective assistance must show both deficient performance and prejudice. *See Charles v. Stephens*, 736 F.3d 380, 388 (5th Cir. 2013) ("A failure to establish either element is fatal to a petitioner's claim.") (internal citation omitted). Given the already highly deferential standard under the AEDPA, establishing a state court's application whether counsel was ineffective "is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013) ("Both the *Strickland* standard and the AEDPA standard are highly deferential, and when the two apply in tandem, review is doubly so.") (internal quotations and citation omitted).

IV. Discussion and Analysis

Maples raises five separate objections to Judge Love's Report. For the reasons expressed below, his objections must be overruled.

1. Certificate of Appealability (COA)

In his first objection, Maples maintains that his habeas petition has not been denied by this Court and, therefore, he has no reason to file an appeal. He then proceeds to explain the appellate process. Maples insists that "at no place in the federal rules for §2244 and §2254 does the petitioner have the burden of proof for a COA." He argues that the Report "has combined the [addressing] of the merits along with its assessing eligibility for COA," which is contrary to the holding in *Buck v. Davis*, 137 S.Ct. 759 (2017).

Maples wholly misconstrues the COA process and Judge Love's recommendation. First, as mentioned in the Report, even though Maples did not file a notice of appeal at this state of the proceedings, the Court may address whether he would be entitled to one. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate

of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show 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).

Here, Judge Love found that Maples wholly failed to demonstrate the denial of a constitutional right and, consequently, recommended that he was not entitled to a certificate of appealability. To obtain a certificate of appealability, Maples must show a constitutional violation or that jurists of reason would disagree with the district court's resolution. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). While the Supreme Court in *Buck* articulated that the COA inquiry "is not coextensive with merits analysis," this means that—in theory—a district court may still find a claim meritless and grant a COA, if the Court believes that reasonable jurists could disagree. *Buck*, 137 S. Ct. 773 (quoting *Miller-El*, 537 U.S. at 336). However, here, Judge Love found that Maples' claims were patently meritless and that reasonable jurists could not disagree. Maples' objection on this point is without merit.

2. Factual Background

Maples takes issue with the Report's use of the facts surrounding his crime—which were extracted directly from the Twelfth Court of Appeals' opinion on his direct appeal. Specifically, he maintains that the facts are "simply not true" and, therefore, an evidentiary hearing is required.

Maples further insists that the M.C. (the victim's lover) lied and "injected false evidence into this case" because the police planted false evidence—namely, the pillow over the victim's head. He sought ballistics testing, which he claimed would have shown that the victim's lover lunged at him first.

His objection on this point is without merit. The appellate court found these facts. The facts are presumed correct absent clear and convincing evidence. *See Bostick v. Quarterman*, 580 F.3d 303, 306 (5th Cir. 2009) ("Further, state court determination of factual issues 'shall be presumed correct,' and the petitioner 'shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.'") (quoting 28 U.S.C. § 2254(e)(1)). Maples has not rebutted this presumption of correctness by clear and convincing evidence because, as Judge Love found, Maples' reliance on a ballistics expert would have been immaterial to whether Maples shot his wife several times. Further, Maples raised this ballistic-trajectory claim in his state habeas application, which was denied. That denial is entitled to deference.

Maples is not entitled to an evidentiary hearing on this matter. His request for an evidentiary hearing is governed by Rule 8 of the Rules Governing Section 2254 cases in the United States District Courts. Rule 8(a) specifies that the determination of whether an evidentiary hearing is required is to be made after an answer and state court records are filed. After a review of the record and answer, Judge Love issued a Report finding that Maples' claims were without merit and, by implication, that no evidentiary hearing was necessary. On objection, Maples fails to illustrate that an evidentiary hearing is required because he has not shown that the appellate court's articulation of the facts were incorrect through clear and convincing evidence. His objection is therefore without merit.

3. Failure to Call a Witness and Expert Testimony

In his third objection, Maples asserts that "the [burden] should not be shifted to Maples to hire an expert post-conviction." He then states that he provided the Court with several cases to demonstrate "why counsel should hire experts when the state's case relies heavily on [its] own experts."

Once again, Maples' objection is without merit. In his petition, he argued that counsel was ineffective for failing to hire a medical expert to challenge the autopsy results. Maples explained that medical expert testimony would confirm that the victim was not shot "twice with the same bullet." Maples states that "one shot is too many," but "he should not be held accountable [for] excess shots he never fired." He again insists that [M.C.] lunged at him when [M.C.] was shot. He also maintained that counsel was ineffective for failing to hire or consult a ballistics/reconstruction expert, as "counsel blindly accepted the State's case without his own professionally objective investigation into the facts and circumstances."

Judge Love found that Maples failed to demonstrate that counsel was ineffective because he failed to meet the necessary requirements and because his claims were purely conclusory, hypothetical, and speculative.

Trial counsel has a duty to make a reasonable investigation of a criminal defendant's case or to make a reasonable decision that an investigation is not necessary. *See Ransom v. Johnson*, 126 F.3d 716, 722 (5th Cir. 1997); *Green v. Cockrell*, 67 F. App'x 248, 2003 WL 2114722 *3 (5th Cir. 2003) (unpublished). A habeas petitioner alleging that an investigation was inadequate or nonexistent must allege—with specificity—what the purported investigation would have revealed and how it would have affected the outcome of the trial. *See Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011) (quoting *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993)).

Moreover, to prevail on a claim of ineffective assistance for counsel's failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, explain the content of the witness's proposed testimony, and show that the proposed testimony would have been favorable to him. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). The Fifth Circuit has repeatedly noted that:

> Complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what a witness would have testified are largely speculative. Where only the evidence of a missing witnesses' testimony is from the defendant, this Court views claims of ineffective assistance with great caution.

Sayre v. Anderson, 238 F.3d 631, 635-36 (5th Cir. 2001) (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986)); *U.S. v. Fields*, 761 F.3d 443, 461 (5th Cir. 2014); *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002). In the same vein, the Fifth Circuit has also held that "hypothetical or theoretical testimony will not justify the issuance of a writ: Rather, the petitioner must demonstrate that the 'might have beens' would have been important enough to affect the proceedings' reliability." *Martin v. McCotter*, 796 F.2d 813, 819 (5th Cir. 1986) (internal citation and quotations omitted).

Here, Judge Love correctly found that Maples failed to demonstrate that counsel was ineffective. First, no burden was ever shifted onto Maples to hire his own expert; instead, because he claimed counsel was ineffective, he was required to meet several elements. As Judge Love found, Maples failed to (1) specifically identify or name the uncalled witnesses, (2) articulate that the alleged witnesses were available and would have appeared to testify, or even (3) show that their testimony would have been favorable. On objection, Maples still fails to meet these elements—he simply presents "might have beens" and hypothetical testimony. The role of the federal court on habeas review is not to grant a criminal defendant a "do-over" or act as a "super state court."

Furthermore, given that the expert ballistics testimony he seeks is immaterial to whether he shot the victim—as he claimed that he should not be held accountable for "excess shots"—Maples cannot show that the outcome would have been different had counsel hired an expert. This objection is wholly meritless and will be overruled.

4. Unreasonable Adjudication

Next, Maples asserts that Judge Love's finding that he failed to demonstrate that the state habeas court's adjudication of these expert witness claims were unreasonable or contrary to federal law "proves Maples' pleadings have not received the fair attention they are deserving of for due process." He takes issue with the state habeas court's decision, the presumption of correctness under the AEDPA, and states that he has "demonstrated very concisely and with a very pointed degree of accuracy in his 2254 that experts needed to be hired."

This objection is a continuation of Maples' disagreement with Judge Love's finding that he failed to show that counsel was ineffective for failing to hire an expert witness. Contrary to his contention, however, he failed to meet *Strickland's* prongs. Aside from failing to name the witness and explain that the witness was available to testify, he wholly failed to demonstrate prejudice. His main contention is that a ballistics or reconstruction expert would have requested that the pillow be tested for blowback as well as "GSR, blood, bone matter, etc. to determine range and if the pillow was used as a buffer in an [execution] style as the State has led the court, jury and the public to believe." Maples stated that further testing of the bullet trajectories would have confirmed that the victim's lover actually lunged at him rather than just lying in bed before the first shot was fired.

Essentially, Maples insisted that a ballistics expert would have tested the pillow, the gun, and various trajectories—which would have ultimately shown that the victim's lover lunged at

Maples before shots were fired and would have disproved the State's assertion that five shots were fired, when only four total shots fired.

However, as Judge Love explained, Maples failed to show that such ballistics testimony would have changed the outcome of the proceedings. First, whether a hypothetical ballistics expert would have testified in this matter is purely speculative. Second, whether the victim's lover lunged at Maples is irrelevant to whether he shot his wife multiple times—especially since he readily admits that four shots were fired. While Maples argues that the police "placed the pillow," this statement is unsupported. Unsupported, conclusory allegations should be dismissed. *See Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983) ("We are thus bound to re-emphasize that mere conclusory allegations do not raise a constitutional issue in a habeas proceeding."). The bottom line is that ballistics testimony—as Maples describes it—would not have changed the outcome of the proceedings because, as Maples admitted in his habeas petition, "one shot is too many." This objection is also without merit.

5. Failure to Testify

In his final objection, Maples maintains that "there was no logical reason for him to not testify, in fact the smartest thing he could have done on counsel's advice was TO testify." In his habeas petition, he argued that counsel was ineffective for advising him not to testify "on a strategy that the State would only provide first-degree murder and not capital murder," thereby violating his constitutional rights. Maples insisted that if he had explained to the jury that he had discovered his wife in bed with another man, the court may have granted an instruction on "sudden passion."

Judge Love found that the record demonstrated that Maples' decision not to testify was his personal choice, entered voluntarily and knowingly. Judge Love highlighted how Maples, under oath, explained that it was his own decision not to testify. Furthermore, Judge Love explained that

Defense counsel then explained to Maples how important the decision was and that once he makes his decision, "we can't ever go back," to which Maples replied "yes, sir." Immediately thereafter, defense counsel asked Maples if he had enough time to think about his decision, to which he responded in the affirmative and stated that his decision was not to testify. (Dkt. #17, pg. id. #100). Additionally, Judge Love analyzed Maples' claim of a "sudden passion defense" and found that such a defense was inapplicable to the facts.

As the Fifth Circuit explained, a criminal defendant's right to testify in his or her own defense is a fundamental right:

> The right to testify is a fundamental right that is personal to the defendant; therefore, only the defendant can waive that right, voluntarily and knowingly. A defendant who argues that his attorney prevented him from testifying must still satisfy the two prongs of *Strickland*. This court has repeatedly held there is a strong presumption that counsel's decision not to place [a defendant] on the stand was sound trial strategy. Nonetheless, counsel cannot override the ultimate decision of a defendant who wishes to testify contrary to counsel's advice.

Bower v. Quarterman, 497 F.3d 459, 473 (5th Cir. 2007) (internal citations and quotations omitted). Here, on objection, Maples is second-guessing his own voluntary decision not to testify.

As Judge Love explained, firm declarations in open court and under oath carry a strong presumption of verity and this Court will not entertain an attempt to hide behind those sworn words. *See United States v. Perez*, 690 F. App'x 191, 192 (5th Cir. 2017) (Mem.) ("A defendant's solemn declarations in open court carry a strong presumption of truth.") (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Maples is relitigating his capital murder case and this Court's role on habeas review is only to review the state court's adjudications.

V. Conclusion

The Court has conducted a careful *de novo* review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Petitioner objected. *See* 28 U.S.C.

§636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Upon such *de novo* review, the Court has determined that the Report of the United States Magistrate Judge is correct and the Plaintiff's objections are without merit. Accordingly, it is

ORDERED that the Petitioner's objections are overruled and the Report of the Magistrate Judge, (Dkt. #22), is **ADOPTED** as the opinion of the District Court. Furthermore, it is

ORDERED that the above-styled application for the writ of habeas corpus is **DISMISSED WITH PREJUDICE**. It is also

ORDERED that the Petitioner Maples is **DENIED** a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby **DENIED**.

So **ORDERED** and **SIGNED February 22, 2019.**

Ron Clark

Ron Clark, Senior District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

LARRY M. MAPLES, #1965775	§	
VS.	§	CIVIL ACTION NO. 6:17cv560
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Larry Michael Maples, proceeding *pro se* and *in forma pauperis*, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his Van Zandt County conviction. The cause of action was referred for findings of fact, conclusions of law, and recommendations for the disposition of the petition.

I. Background

A jury convicted Maples of capital murder and he was sentenced to life imprisonment without the possibility of parole. Maples filed a direct appeal, and the Twelfth Court of Appeals affirmed his conviction. *See Maples v. State*, 2016 WL 3475334 (Tex.App.—Tyler 2016, pet. ref'd) (unpublished). The Texas Court of Criminal Appeals refused his petition for discretionary review on in November 2016. Maples then filed a state application for a writ of habeas corpus in June 2017, which was denied by the Texas Court of Criminal Appeals on the findings of the trial court. He then filed this timely federal petition in October 2017.

II. Factual Background

The appellate court summarized the facts as follows:

> During the early morning hours of March 23, 2013, Appellant drove to [M.C.'s] residence, which was located in a rural location outside Canton, Texas. He parked his vehicle three-tenths of a mile away from the residence and walked the remainder of the way carrying a Colt .45 semi-automatic handgun. He entered the residence and found his wife, Heather Maples, in a bedroom with [M.C.]. Appellant immediately shot [M.C.] once in the abdomen and shot Heather several times, with the fatal shot being fired after Appellant placed a pillow over Heather's head as she lay on the floor. Afterwards, while still at

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> [M.C.'s] house, Appellant made several calls from his cell phone. In the calls, he admitted shooting both [M.C.] and Heather and stated that Heather was dead. Appellant waited at the residence until police arrived and told the investigating officer what he had done.
>
> . . .
>
> To that end, the evidence shows that Appellant and Heather Maples were having marital difficulties and she asked Appellant to move out of their home. Heather had a prior long-term relationship with [M.C.], and Appellant suspected that she and [M.C.] had begun having an affair. Earlier that day, family members observed that Appellant was withdrawn and not interacting normally with them. In the early evening, an acquaintance of Appellant who was an ordained minister believed Appellant was emotionally disturbed. Appellant returned to his parents' house and was last seen by his sister in his bedroom before she went to sleep.
>
> That night, without notifying anyone, Appellant left his parents' home to look for Heather. When he did not find her at their home, he drove to [M.C.'s] home with a handgun in his possession. Appellant parked his vehicle three-tenths of a mile from [M.C.'s] residence and walked the remainder of the way to the house. The entrance to [M.C.'s] property had a mechanical gate, which could be opened only after entering the access code. But because Appellant was not in a vehicle, he was able to enter [M.C.'s] property. Upon arriving at [his] house, he entered the residence through an unlocked door. When he found Heather and [M.C.] in a bedroom, he shot [M.C.] once in the abdomen while he was in bed and ultimately shot Heather at least four times.
>
> Appellant called 911 from [M.C.'s] residence and told the 911 dispatcher that he had gone to the home of his wife's boyfriend, shot him in the belly, shot his wife "a bunch of times," and his wife was not breathing. A recording of the 911 call was played to the jury. In the background of the 911 tape, [M.C.'s] voice can be heard giving Appellant the physical address of the residence to give to law enforcement, as well as the code to enter the mechanical gate upon arriving.
>
> . . .
>
> Appellant was charged by indictment with capital murder. More particularly, the State alleged in the indictment that Appellant intentionally caused the death of Heather Maples while in the course of committing the offense of burglary of a habitation. Initially, the State filed a notice of intent to seek the death penalty, but withdrew the notice before the case went to trial. Appellant pleaded "not guilty," and the jury found him "guilty" as charged. The trial court sentenced Appellant to the mandatory punishment for life without the possibility of parole. This appeal followed.

See Maples, 2016 WL 3475334 *1-3.

III. Maples' Federal Habeas Petition

Maples argues that his constitutional rights were violated through his counsel's ineffectiveness. Specifically, he maintains that counsel was ineffective by (1) failing to hire/consult with a ballistics or reconstruction expert; (2) failing to hire a medical expert to challenge the State's autopsy findings; (3) advising him not to testify; and (4) failing to build a defense surrounding a "sudden passion."

Upon order of the Court, Respondent filed a response to Maples' petition. Respondent insists that counsel was not ineffective and that Maples' claim concerning a potential "sudden passion" defense is unexhausted. Maples filed a reply to the response.

IV. Standard of Review

1. Federal Habeas Review

The role of federal courts in reviewing habeas corpus petitions filed by state prisoners is exceedingly narrow. A prisoner seeking federal habeas corpus review must assert a violation of a federal constitutional right; federal relief is unavailable to correct errors of state constitutional, statutory, or procedural law unless a federal issue is also present. *See Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993); *see also Estelle v. McGuire*, 503 F.3d 408, 413 (5th Cir. 2007) ("We first note that 'federal habeas corpus relief does not lie for errors of state law.'") (internal citation omitted). When reviewing state proceedings, a federal court will not act as a "super state supreme court" to review error under state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007).

Furthermore, federal habeas review of state court proceedings is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Under the AEDPA, which imposed a number of habeas corpus reforms, a petitioner who is in custody "pursuant to the judgment of State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established 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 proceedings.

28 U.S.C. § 2254(d). The AEDPA imposes a "highly deferential standard for evaluating state court rulings," which demands that federal courts give state court decisions "the benefit of the doubt." *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted); *see also Cardenas v. Stephens*, 820 F.3d 197, 201-02 (5th Cir. 2016) ("Federal habeas review under the AEDPA is therefore highly deferential: The question is not whether we, in our independent judgment, believe that the state court reached the wrong result. Rather, we ask only whether the state court's judgment was so obviously incorrect as to be an objectively unreasonable resolution of the claim."). Given the high deferential standard, a state court's findings of fact are entitled to a presumption of correctness and a petitioner can only overcome that burden through clear and convincing evidence. *Reed v. Quarterman*, 504 F.3d 465, 490 (5th Cir. 2007).

2. Ineffective Assistance of Counsel

To show that trial counsel was ineffective, Hudson must demonstrate both deficient performance and ensuing prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). In evaluating whether an attorney's conduct was deficient, the question becomes whether the attorney's conduct fell below an objective standard of reasonableness based on "prevailing norms of practice." *See Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2016).

Moreover, to establish prejudice, the petitioner must show that there is a reasonable probability that—absent counsel's deficient performance—the outcome or result of the proceedings would have been different. *Id.*; *see also Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687)). It is well-settled that a "reasonable probability" is one that is sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466

U.S. at 694. Importantly, the petitioner alleging ineffective assistance must show both deficient performance and prejudice. *See Charles v. Stephens*, 736 F.3d 380, 388 (5th Cir. 2013) ("A failure to establish either element is fatal to a petitioner's claim.") (internal citation omitted). Given the already highly deferential standard under the AEDPA, establishing a state court's application whether counsel was ineffective "is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013) ("Both the *Strickland* standard and the AEDPA standard are highly deferential, and when the two apply in tandem, review is doubly so.") (internal quotations and citation omitted).

V. Discussion and Analysis

1. Ballistcs/Reconstruction and Medical Experts

In his first two claims, Maples argues that counsel was ineffective for failing to hire and call experts. First, he contends that counsel was ineffective for failing to hire or consult a ballistics/reconstruction expert, as "counsel blindly accepted the State's case without his own professionally objective investigation into the facts and circumstances." A ballistics or reconstruction expert would have requested that the pillow be tested for blowback as well as "GSR, blood, bone matter, etc. to determine range and if the pillow was used as a buffer in an [execution] style as the State has led the court, jury and the public to believe." Maples states that further testing of the bullet trajectories would have confirmed that [M.C.] actually lunged at him rather than just lying in bed before the first shot was fired.

Second, Maples insists that counsel was ineffective for failing to hire a medical expert to challenge the autopsy results. He argues that medical expert testimony would confirm that the victim was not shot "twice with the same bullet." Maples states that "one shot is too many," but "he should not be held accountable [for] excess shots he never fired." He again insists that [M.C.] lunged at him when [M.C.] was shot.

Trial counsel has a duty to make a reasonable investigation of a criminal defendant's case or to make a reasonable decision that an investigation is not necessary. *See Ransom v. Johnson*, 126 F.3d 716, 722 (5th Cir. 1997); *Green v. Cockrell*, 67 Fed.App'x 248, 2003 WL 2114722 *3 (5th Cir. 2003) (unpublished). A habeas petitioner alleging that an investigation was inadequate or nonexistent must allege—with specificity—what the purported investigation would have revealed and how it would have affected the outcome of the trial. *See Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011) (quoting *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993)).

Moreover, in order to prevail on a claim of ineffective assistance for counsel's failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, explain the content of the witness's proposed testimony, and show that the proposed testimony would have been favorable to him. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). The Fifth Circuit has repeatedly noted that:

> Complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what a witness would have testified are largely speculative. Where only the evidence of a missing witnesses' testimony is from the defendant, this Court views claims of ineffective assistance with great caution.

Sayre v. Anderson, 238 F.3d 631, 635-36 (5th Cir. 2001) (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986)); *U.S. v. Fields*, 761 F.3d 443, 461 (5th Cir. 2014); *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002). In the same vein, the Fifth Circuit has also held that "hypothetical or theoretical testimony will not justify the issuance of a writ: Rather, the petitioner must demonstrate that the 'might have beens' would have been important enough to affect the proceedings' reliability." *Martin v. McCotter*, 796 F.2d 813, 819 (5th Cir. 1986) (internal citation and quotations omitted).

Here, as the Respondent argues, Maples fails to demonstrate that counsel was ineffective for failing to investigate or call any ballistics/reconstruction expert or medical expert. He failed to (1) specifically identify or name the uncalled witnesses, (2) articulate that the alleged witnesses

were available and would have appeared to testify, or even (3) show that their testimony would have been favorable. Maples' reliance on uncalled witnesses is purely conclusory, hypothetical, and speculative—which does not demonstrate a constitutional violation. While Maples insists that counsel relied solely on the State's evidence and/or witnesses, he fails to provide this Court with any specifics about a particular witness. Unsupported, conclusory allegations should be dismissed. *See Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983) ("We are thus bound to re-emphasize that mere conclusory allegations do not raise a constitutional issue in a habeas proceeding.").

Turning to Maples' claim regarding counsel's failure to investigate ballistics, the Court notes that his claim again fails. Essentially, Maples insists that a ballistics expert would have tested the pillow, the gun, and various trajectories—which would have ultimately shown that [M.C.] lunged at Maples before shots were fired and would have disproved the State's assertion that five shots were fired, when only four total shots fired.

In order to illustrate that counsel was ineffective for failing to investigate, the petitioner must allege, with specificity, what the investigation would reveal and how it would have changed the outcome of the trial. *See Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005). Here, while Maples describes what a purported investigation would have allegedly shown, any investigation into the amounts of shots fired and whether M.C. lunged at Maples prior to the shooting would not have changed the outcome of the trial.

As the State highlights, there is no dispute that Maples killed the victim after shooting her multiple times. Maples was not on trial for the shots fired at M.C.; in other words, whether M.C. lunged at Maples before he was shot is irrelevant to determine whether he shot his wife multiple times—especially because there was nothing in the record to suggest that M.C. lunged at Maples before he began firing shots and that Maples specifically admitted to shooting and killing his wife.

Importantly, Maples raised this claim in his state habeas application. The Texas Court of Criminal Appeals denied relief. Accordingly, because the state habeas court rejected this claim, this Court must give deference to that adjudication. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011) ("By its terms, §2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject to only the exceptions in §§ 2254(d)(1) and (2).") (internal citation omitted); *see also Trottie v. Stephens*, 720 F.3d 231, 240 (5th Cir. 2013) ("We evaluate the debatability of Trottie's constitutional claims under AEDPA's highly deferential standard, which 'demands that state-court decisions be given the benefit of the doubt.') (internal citation omitted). Maples failed to demonstrate that this adjudication was unreasonable or contrary to federal law.

2. Failure to Testify

Next, Maples maintains that counsel was ineffective for advising him not to testify "on a strategy that the State would only provide first-degree murder and not capital murder," thereby violating his constitutional rights. He insists that if he had explained to the jury that he had discovered his wife in bed with another man, the court may have granted an instruction on "sudden passion."

As the Fifth Circuit explained, a criminal defendant's right to testify in his or her own defense is a fundamental right:

> The right to testify is a fundamental right that is personal to the defendant; therefore, only the defendant can waive that right, voluntarily and knowingly. A defendant who argues that his attorney prevented him from testifying must still satisfy the two prongs of *Strickland*. This court has repeatedly held there is a strong presumption that counsel's decision not to place [a defendant] on the stand was sound trial strategy. Nonetheless, counsel cannot override the ultimate decision of a defendant who wishes to testify contrary to counsel's advice.

Bower v. Quarterman, 497 F.3d 459, 473 (5th Cir. 2007) (internal citations and quotations omitted).

Here, the record shows that Maples' decision not to testify was his personal choice, entered voluntarily and knowingly. The record reveals that Maples specifically stated, under oath, that it was his own decision not to testify. *See* Dkt. #17, pg. id. #100. Defense counsel then explained how important the decision was and that once he makes his decision, "we can't ever go back," to which Maples replied "yes, sir." *Id.* Immediately thereafter, defense counsel asked Maples if he had enough time to think about his decision, to which he responded in the affirmative and stated that his decision was not to testify. *Id.* The record therefore shows that Maples understood his right to testify, and waived that right both voluntarily and knowingly. His claim to the contrary is an attempt to now hide behind his own sworn words, as firm declarations in open court and under oath carry a strong presumption of verity. *See United States v. Perez*, 690 Fed.App'x 191, 192 (5th Cir. 2017) (Mem.) ("A defendant's solemn declarations in open court carry a strong presumption of truth.") (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)).

Even if Maples testified in his own defense based on a "sudden passion" theory, the outcome of the proceedings would not have been different. For reasons explained below, a defense theory based on "sudden passion" would have been meritless.

3. Sudden Passion

In his final claim, Maples argues that counsel and appellate counsel were ineffective for failing to present a defense based on "sudden passion." Specifically, Maples contends that the main issue at trial should have been his lack of intent to murder the victim. He states that "[n]o amount of preparation can allow a man to find his new wife in bed with her ex-lover in a state of undress as Maples did, and he just be able to turn around and walk out. It is rare that the passion and shock doesn't affect the Husband."

As the State correctly argues, this specific claim is unexhausted. Under the AEDPA, federal courts may not grant habeas relief unless the petitioner has exhausted available remedies

in state courts. *See* 28 U.S.C. §2254(d)(2). To satisfy the exhaustion requirement, the petitioner must "fairly present" his legal claim to the highest state court prior to filing in federal court, which, here, is the Texas Court of Criminal Appeals. *See Nickleson v. Stephens*, 803 F.3d 748, 753 (5th Cir. 2015); *see also Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) ("Exhaustion requires a state prisoner to present the state courts with the same claim he urges upon the federal courts.") (internal quotations and citation omitted). Furthermore, the exhaustion requirement is not satisfied when the petitioner raises a "somewhat similar" state-law claim in federal court. *See Wilder*, 274 F.3d at 259 ("It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made.") (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982)).

Here, a review of the state records illustrate that Maples never presented his claim that counsel was ineffective for failing to raise a defense based on sudden heat of passion to the state courts. A review of his direct appeal, petition for discretionary review, and his state habeas application do not show that he presented this claim. Accordingly, this claim is unexhausted and the Court could dismiss the claim for that reason alone.

However, in the interest of justice and because Maples repeatedly insists that his rights were violated because defense counsel failed to focus on his lack of intent and the fact that he saw his wife in bed with an ex-boyfriend, the Court will address the claim.

A murder defense based on "sudden passion" would have been meritless. Under Texas law, a person commits first-degree murder if he or she:

> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
>
> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate fight from the

> commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

See Tex. Penal Code Ann. § 19.02(b) (2013). At the punishment stage of a trial, a defendant may raise the issue of "sudden passion," at which point the defendant must prove the issue in the affirmative by a preponderance of the evidence; if successful, the offense becomes a second-degree felony and subjects a defendant to a maximum sentence of twenty years' imprisonment. *See* Tex. Penal Code Ann. § 19.02(d) (2013). Under the statute, "sudden passion" means "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises **at the time of the offense** and is not solely the result of former provocation." *See* Tex. Penal Code Ann. § 19.02(a)(2) (2013) (emphasis supplied). Adequate cause for such passion is "a cause that would commonly produce anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." *See Wooten v. State*, 400 S.W.3d 601, 605 (Tex.Crim.App. 2013).

In order to receive a jury instruction on the issue of sudden passion at the punishment phase, the record must minimally support an inference that: (1) the defendant in fact acted under the immediate influence of a passion such as terror, anger, rage, or resentment; (2) his sudden passion was induced by some provocation by the deceased or another acting with him, which provocation would commonly produce such a passion in a person of ordinary temper; (3) he committed the murder before regaining his capacity for cool reflection; and (4) a causal connection existed "between the provocation, passion, and homicide." *See id.*; *see also McKinney v. State*, 179 S.W.3d 565, 569 (Tex.Crim.App. 2005). The homicide must occur while the passion still exists and "before there is a reasonable opportunity for the passion to cool." *See Swearington v. State*, 270 S.W.3d 804, 820 (Tex.App.—Austin 2008, pet. ref'd).

Here, the facts of this case do not support a sudden passion theory. As mentioned, the facts show that Maples and the victim were having marital difficulties, and he suspected her of having

an affair with M.C.—her previous boyfriend. Earlier on the day of the murder, family members and acquaintances observed that Maples was withdrawn, not acting normally, and seemingly emotionally disturbed. Despite his state, Maples drove to M.C.'s house, where the victim was located; he parked his car within walking distance to the house before walking to the house while carrying a semi-automatic handgun. After entering the home without consent, Maples entered a bedroom and found M.C. and the victim. He immediately shot M.C. and then shot the victim multiple times. The record illustrates that Maples shot the victim at least four times as she lay bleeding—with the fatal blow being as Maples shot her through a pillow placed over her head. After the final shot, Maples made several phone calls—as M.C. remained suffering from a gun shot to his abdomen—admitting to the murder. He even waited until law enforcement arrived and told them what he did.

The facts do not show that Maples acted under the immediate influence of a passion. To the contrary, **prior** to entering the house Maples believed that the victim was having an affair with M.C., prompting his decision to look for the victim and arrive at M.C.'s house. He cannot then argue that he only became upset or angered when he first witnessed M.C. and his wife the bedroom.

Moreover, as previously mentioned, there is no evidence in the record whatsoever to show that Maples was provoked by either M.C. or the victim. Maples repeatedly shot the victim—at least four times, one shot at point-blank range over a pillow into her head—which necessarily belies any argument that he acted under immediate sudden passion when he committed the murder. *See, e.g.*, *Ruth v. Thaler*, 2013 WL 4515900 *17 (S.D.Tex.—Houston Aug. 23, 2013) ("Moreover, the evidence in the record indicates that Ruth's conduct, in which he shot the victim fifteen times, would preclude a finding by a rational jury that he acted under sudden passion when he committed the homicide."); *Reese v. State*, 340 S.W.3d 838, 842 (Tex.App.—San Antonio 2011, no pet.) (explaining that "shooting [the victim] several more times because appellant did not want Sanford

to suffer by living with the fact that the man she loved had shot her" is not an objectively common response in an ordinary, reasonable person.); *Swearington*, 270 S.W.3d at 820 ("There was little, if any, evidence that Swearington could have been acting under the immediate influence of sudden passion when, after strangling [the victim], he "threw her" into the half-full bathtub, left her there, and later placed her in a car trunk with a trash bag over her head—all means through which the jury could have found Swearington intentionally or knowingly caused [the victim's] death.").

Accordingly, given the facts of the case, any "sudden passion" defense at any stage would have been meritless. Because counsel cannot be ineffective for failing to raise a meritless issue, this claim should be dismissed. *See Wood v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) (explaining that counsel cannot be constitutionally ineffective for failing to raise a meritless argument). This claim should therefore be dismissed.

VI. Conclusion

Maples has failed to show that the state habeas court's adjudication of his claims resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. His application for federal habeas corpus relief is thus without merit.

VII. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Petitioner has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate

of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show 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). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

Here, Maples failed to present a substantial showing of a denial of a constitutional right or that the issues he has presented are debatable among jurists of reason. He also failed to demonstrate that a court could resolve the issues in a different manner or that questions exist warranting further proceedings. Accordingly, he is not entitled to a certificate of appealability.

RECOMMENDATION

For the foregoing reasons, it is recommended that the above-styled application for the writ of habeas corpus be dismissed with prejudice. It is further recommended that Petitioner Maples be denied a certificate of appeal *sua sponte*.

Within fourteen (14) days after receipt of the magistrate judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 8th day of June, 2018.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 24, 2016

NO. 12-14-00337-CR

For the record

LARRY MICHAEL MAPLES,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 294th District Court
of Van Zandt County, Texas (Tr.Ct.No. CR13-00334)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

Appendix F

EXHIBIT 8

NO. 12-14-00337-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

LARRY MICHAEL MAPLES, APPELLANT	§	*APPEAL FROM THE 294TH*
V.	§	*JUDICIAL DISTRICT COURT*
THE STATE OF TEXAS, APPELLEE	§	*VAN ZANDT COUNTY, TEXAS*

MEMORANDUM OPINION

Larry Michael Maples appeals his conviction for capital murder, for which he was sentenced to life imprisonment without the possibility of parole. In two issues, Appellant contends the evidence is insufficient to support the jury's verdict. In a third issue, Appellant argues that the State violated his due process rights by knowingly presenting perjured testimony. We affirm.

BACKGROUND

During the early morning hours of March 23, 2013, Appellant drove to Moises Clemente's residence, which was located in a rural location outside Canton, Texas. He parked his vehicle three-tenths of a mile away from the residence and walked the remainder of the way carrying a Colt .45 semi-automatic handgun. He entered the residence and found his wife, Heather Maples, in a bedroom with Clemente. Appellant immediately shot Clemente once in the abdomen and shot Heather several times, with the fatal shot being fired after Appellant placed a pillow over Heather's head as she lay on the floor. Afterwards, while still at Clemente's home, Appellant made several calls from his cell phone. In the calls, he admitted shooting both Clemente and Heather and stated that Heather was dead. Appellant waited at the residence until police arrived and told the investigating officer what he had done.

Appendix F

Appellant was charged by indictment with capital murder. More particularly, the State alleged in the indictment that Appellant intentionally caused the death of Heather Maples while in the course of committing the offense of burglary of a habitation. Initially, the State filed a notice of intent to seek the death penalty, but withdrew the notice before the case went to trial. Appellant pleaded "not guilty," and the jury found him "guilty" as charged in the indictment. The trial court sentenced Appellant to the mandatory punishment of imprisonment for life without the possibility of parole.[1] This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant asserts the evidence is insufficient to support his conviction for the offense of capital murder. In his second issue, Appellant asserts the trial court erred in denying his motion for directed verdict. A challenge to a trial court's ruling on a motion for directed verdict is a challenge to the sufficiency of the evidence to support a conviction, and they are reviewed under the same standards. ***Williams v. State***, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). Accordingly, we will address Appellant's first and second issues together.

Standard of Review

When sufficiency of the evidence is challenged on appeal, we view all of the evidence in the light most favorable to the verdict to decide whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1970); ***Brooks v. State***, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under this standard, the jury is the sole judge of the witnesses' credibility and the weight of their testimony. ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Brooks***, 323 S.W.3d at 899. We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the basic facts to ultimate facts. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Id.*** A trial judge who is not the finder of fact on the issue of guilt can direct a verdict in the defendant's favor only if, after viewing the evidence in the light most favorable to the prosecution, she cannot conclude

[1] *See* TEX. PENAL CODE ANN. § 12.31(a)(2) (West Supp. 2015) (capital murder punishable by imprisonment for life without parole or by death).

that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***York v. State***, 342 S.W.3d 528, 544 (Tex. Crim. App. 2011).

In determining whether the state has met its burden of proving the defendant guilty beyond a reasonable doubt, we compare the elements of the crime as defined by a hypothetically correct jury charge to the evidence adduced at trial. ***Thomas v. State***, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). A hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the state's burden or restrict its theories of liability, and adequately describes the particular offense for which the defendant was tried. ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Applicable Law

In relevant part, a person commits murder if he intentionally causes the death of an individual. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). The offense of capital murder, based on the allegations in the indictment in this case, requires proof that the person intentionally committed the murder while in the course of committing or attempting to commit burglary. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2015).

A person commits the offense of burglary if, without the effective consent of the owner, he enters a habitation and commits or attempts to commit a felony, theft, or an assault. TEX. PENAL CODE ANN. § 30.02(a)(3) (West 2011). Under Section 30.02(a)(3), the State was not required to prove that Appellant entered Clemente's residence with the specific intent to commit burglary at the moment of entry. ***Rivera v. State***, 808 S.W.2d 80, 92 (Tex. Crim. App. 1991). Rather, in a capital murder prosecution, the murder of the victim satisfies not only the murder requirement for capital murder, but also the underlying felony requirement to support burglary. *See* ***Gardner v. State***, 306 S.W.3d 274, 287 (Tex. Crim. App. 2009) ("In a prosecution for capital murder based on burglary, the requirement that a felony be intended is satisfied by the murder of the victim."); ***Homan v. State***, 19 S.W.3d 847, 848 (Tex. Crim. App. 2000) (reversing court of appeals' holding that murder of complainant could not be used to turn entry into home a burglary); ***Matamoros v. State***, 901 S.W.2d 470, 474 (Tex. Crim. App. 1995) (holding evidence was sufficient to prove burglary component of capital murder where defendant entered complainant's home without his consent and killed complainant).

Forced entry is not an element of burglary; rather, burglary requires the entry to be made without the effective consent of the owner. *See* TEX. PENAL CODE ANN. § 30.02; ***Ellett v. State***,

607 S.W.2d 545, 549 (Tex. Crim. App. [Panel Op.] 1980); *see also* ***Evans v. State***, 677 S.W.2d 814, 818 (Tex. App.—Fort Worth 1984, no pet.) ("A person can make an unlawful entry by walking through an open door when the entry is without the owner's consent."). Moreover, lack of consent to entry in burglary prosecutions may be shown by circumstantial evidence. ***Hathorn v. State***, 848 S.W.2d 101, 107 (Tex. Crim. App. 1992).

Discussion

As charged in the indictment, the State was required to show that Appellant intentionally caused the death of Heather Maples by shooting her with a firearm while in the course of committing the offense of burglary of a habitation of the owner, Moises Clemente. *See* TEX. PENAL CODE ANN. § 19.03(a)(2). Appellant does not contest that he entered Clemente's habitation or that, after doing so, he shot and killed Heather Maples. Accordingly, he concedes the evidence supports a conviction for murder. Appellant contends, however, that the evidence is insufficient to prove he killed his wife during the course of a burglary. Since the murder of the victim supplies the requirement that a felony be committed to support burglary, the only question for our determination is whether the evidence is sufficient to prove that Appellant did not have Clemente's consent to enter his residence. *See* ***Gardner v. State***, 306 S.W.3d at 287; ***Homan***, 19 S.W.3d at 848; ***Matamoros***, 901 S.W.2d at 474. Therefore, we limit our analysis to that element. *See* TEX. R. APP. P. 47.1.

The focus of Appellant's insufficiency argument is an attack on the credibility of Moises Clemente. He points out that Clemente testified he and Heather Maples had not engaged in intimate contact on the night in question when forensic evidence showed otherwise. Appellant states that this establishes Clemente committed perjury. Appellant appears to argue that because Clemente was untruthful about whether he and Heather had engaged in sexual activity before Appellant's arrival, the jury's reliance on his testimony as a whole was unreasonable or irrational. Thus, he insists that his conviction should not be upheld. We disagree.

As stated above, our analysis is limited to the sufficiency of the evidence that Appellant entered Clemente's residence without his consent on the night in question. To that end, the evidence shows that Appellant and Heather Maples were having marital difficulties and she asked Appellant to move out of their home. Heather had a prior long-term relationship with Clemente, and Appellant suspected that she and Clemente had begun having an affair. Earlier that day, family members observed that Appellant was withdrawn and not interacting normally

with them. In the early evening, an acquaintance of Appellant who was an ordained minister believed that Appellant was emotionally disturbed. Appellant returned to his parents' home and was last seen by his sister in his bedroom before she went to sleep.

That night, without notifying anyone, Appellant left his parents' home to look for Heather. When he did not find her at their home, he drove to Clemente's home with a handgun in his possession. Appellant parked his vehicle three-tenths of a mile from Clemente's residence and walked the remainder of the way to the house. The entrance to Clemente's property had a mechanical gate, which could be opened only after entering the access code. But because Appellant was not in a vehicle, he was able to enter Clemente's property.[2] Upon arriving at Clemente's house, he entered the residence through an unlocked door. When he found Heather and Clemente in a bedroom, he shot Clemente once in the abdomen while he was in the bed and ultimately shot Heather at least four times.

Appellant called 911 from Clemente's residence and told the 911 dispatcher that he had gone to the home of his wife's boyfriend, shot him in the belly, shot his wife a "bunch of times," and his wife was not breathing. A recording of the 911 call was played to the jury. In the background of the 911 tape, Clemente's voice can be heard giving Appellant the physical address of the residence to give to law enforcement, as well as the code to enter the mechanical gate upon arriving.

The evidence reflects that Appellant was upset that Heather wanted a divorce and asked that he move out of their house. Appellant's demeanor earlier in the day shows that he was consumed with the thought that Heather had resumed a relationship with Clemente, and witnesses observed that he seemed emotionally disturbed early in the evening. The jury could reasonably conclude that Appellant left his family's home in the middle of the night with a large caliber handgun in his possession to look for Heather with a plan to find and confront her.

Although Appellant's father specifically told him not to go to Clemente's home, Appellant did so under the cover of darkness and parked his vehicle far enough away so that his arrival would not be detected. After parking, Appellant walked across Clemente's property

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[2] Appellant did not testify, and there is no direct testimony about how Appellant entered the property. But Clemente testified that the property was a 125 acre ranch that was fenced and gated. He believed that the driveway from the gate to his home was approximately 1,500 feet. During the 911 call, the dispatcher informed Appellant that law enforcement officers were at the gate and needed the code to enter the property. Appellant did not know the code, but Clemente can be heard providing it. Based on these facts, it was reasonable to infer that the gate was closed when Appellant approached the property, and that he entered it by traversing the gate or the fence.

towards his home, presumably expecting to find Heather there. Upon arrival, Appellant would have been able to see Heather's vehicle parked at Clemente's residence and surmise that she was inside with Clemente. Because Clemente and Heather were shot in a bedroom, it was logical for the jury to assume Appellant entered the residence undetected through an unlocked door without knocking or otherwise putting the occupants on notice of his presence. Similarly, the jury could infer from this evidence that Appellant planned to surprise, confront, and injure Heather and Clemente. Finally, the jury could reasonably conclude from this evidence that Appellant entered Clemente's property and his home without Clemente's permission or effective consent. Accordingly, the evidence is sufficient to support the jury's finding that Appellant did not have Clemente's consent to enter his residence, and the trial court did not err in denying Appellant's motion for directed verdict.

Appellant's first and second issues are overruled.

DUE PROCESS

In his third issue, Appellant argues that the State knowingly presented perjured testimony through Moises Clemente in violation of his due process rights.[3]

Standard of Review and Applicable Law

A defendant is denied his right to due process when his conviction is obtained through the State's knowing use of false evidence. *See* ***Napue v. People of State of Ill.***, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); ***Ex parte Castellano***, 863 S.W.2d 476, 481 (Tex. Crim. App. 1993) (holding state violates defendant's due process rights when it actively or passively uses perjured testimony to obtain conviction). A due process violation may arise not only through false testimony specifically elicited by the state, but also by the state's failure to correct testimony it knows to be false. ***Ex parte Ghahremani***, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011). The testimony need not necessarily be perjured to constitute a due process violation; rather it is sufficient that the testimony was false. ***Ex parte Chavez***, 371 S.W.3d 200,

[3] The third issue specifically set forth by Appellant in his brief is that the trial court erred by refusing to include a requested instruction regarding perjury. However, Appellant does not cite to authorities or the record, or otherwise provide analysis pertaining to the stated issue. Therefore, we decline to address the stated issue because it is inadequately briefed. *See* TEX. R. APP. P. 38.1(*i*); ***Bell v. State***, 90 S.W. 3d 301, 305 (Tex .Crim. App. 2002). However, we will address Appellant's denial of due process claim because the substance of the argument contained in the brief addresses a constitutionally protected right and an appellate court must construe an appellant's brief liberally and review issues that are fairly included within a particular issue or point. *See* TEX. R. APP. P. 38.1(f); ***Ramsey v. State***, 249 S.W.3d 568, 581 n.5 (Tex. App.—Waco 2008, no pet.).

208 (Tex. Crim. App. 2012). That is because a false evidence due process claim is not aimed at preventing the crime of perjury, which is punishable in its own right, but is designed to ensure that the defendant is convicted and sentenced on truthful testimony. ***Id.*** at 211.

However, only the use of *material* false testimony amounts to a due process violation. ***Id.*** at 208. False testimony is material only if there is a "reasonable likelihood" that it affected the judgment of the jury. ***Ghahremani***, 332 S.W.3d at 477. "Whether the perjured testimony harmed the defendant can be quantitatively assessed by examining the remaining evidence at trial and the effect of the perjured testimony upon that evidence." ***Ex parte Fierro***, 934 S.W.2d 370, 373 (Tex. Crim. App. 1996). Because the materiality standard for the state's knowing use of perjured testimony is identical to the constitutional harmless error standard, an analysis under the materiality standard obviates the need to conduct a separate harmless error analysis on direct appeal. *See* ***id.***; *see also* ***Ramirez v. State***, 96 S.W.3d 386, 396 (Tex. App.—Austin 2002, pet. ref'd) (noting that materiality standard in reviewing state's knowing use of perjured testimony "is essentially the harmless error standard for constitutional error embodied in the Texas Rules of Appellate Procedure 44.2(a)").

When confronted with constitutional error, a reviewing court must reverse the judgment unless it can conclude that the error did not contribute to the defendant's conviction or punishment beyond a reasonable doubt. TEX. R. APP. P. 44.2(a). Our 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) (op. on reh'g). 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 take into account the entire record, 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). This requires us to evaluate the 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), *disagreed with in part on other grounds by* ***Snowden***, 353 S.W.3d at 821–22.

Discussion

Reurging his earlier argument attacking Clemente's credibility, Appellant contends the forensic evidence established that Clemente committed perjury when he denied that he had engaged in intimate contact with Heather shortly before Appellant shot them. He contends further that the State knew this denial was not true when Clemente made it under oath in front of the jury. Appellant's argument continues that the State's knowing presentation of Clemente's perjured testimony on this subject, without taking any action to correct the false statement, is a due process violation that requires reversal of his conviction.

In addressing this issue, we will assume, without deciding, that the State knew Clemente testified falsely when he denied that he and Heather had recently engaged in intimate contact. Therefore, our analysis will focus on the materiality element.

Before trial, the State disclosed and produced the forensic reports to Appellant's counsel indicating Clemente and Heather had recently engaged in intimate contact. Appellant called the DPS technician who analyzed the DNA evidence as a witness at trial. Thus, the jury was aware that Clemente's denial that he and Heather had not engaged in intimate contact was inconsistent with the forensic evidence. However, the jury, as the trier of fact, is the sole judge of the credibility of the witnesses and of the strength of the evidence. ***Fuentes v. State***, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. ***Sharp v. State***, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury was entitled to disbelieve Clemente's denial of engaging in intimate contact with Heather and believe his testimony on other matters.

Additionally, when viewed in a neutral light after disregarding Clemente's denial, the remaining evidence shows that Appellant went to Clemente's residence and entered without Clemente's effective consent. The physical evidence shows that Appellant confronted Heather and Clemente while they were in the bedroom and shot Clemente while he was still in his bed. The evidence shows further that Appellant sought, found, and killed Heather in a cold and calculated manner. When Appellant called his father after shooting Clemente and Heather, he stated that "I did what y'all told me not to do." When asked what he did, Appellant answered that he "shot Mo [Moises Clemente] and killed Heather." At his father's direction, Appellant called 911 and told the 911 dispatcher he had gone to his wife's boyfriend's home where he shot the boyfriend in the belly, shot his wife a "bunch of times," and his wife was not breathing.

Appellant told the 911 dispatcher that Heather had asked for a divorce and he knew by looking at her phone and text messages that she had been seeing Clemente. He told the dispatcher that Heather had been with "this guy" all day, it "ate him up," and he was "sick of it." Appellant later told Ranger Brent Davis that he went to Clemente's house looking for Heather and that he took the handgun with him as he was looking for her. The cumulative force of this evidence, including Appellant's own admissions, overwhelmingly supports the jury's verdict beyond a reasonable doubt.

Moreover, Clemente's denial that he and Heather had recently engaged in intimate conduct was not relevant to any element of the offense. Nor can we identify any probable collateral implications Clemente's denial might have had.

Based upon our review of the record and our consideration of the relevant factors, we conclude that the jury did not place any weight on Clemente's testimony concerning whether he and Heather had recently engaged in intimate contact. Therefore, there was not a "reasonable likelihood" that such testimony affected the judgment of the jury. Accordingly, we hold that the testimony was not material.

Appellant's third issue is overruled.

DISPOSITION

Having overruled Appellant's three issues, we ***affirm*** the judgment of the trial court.

GREG NEELEY
Justice

Opinion delivered June 24, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)