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LUCIEN, KEVIN LEON Tr. Ct. No. 16-02396-CRF-361-A WR-93,979-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

KEVIN LEON LUCIEN
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CAUSE NO. 16-02396-CRF-361-A

EX PARTE	§	IN THE 361ST DISTRICT COURT
	§	OF
KEVIN LUCIEN	§	BRAZOS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has considered Applicant's Application for Writ of Habeas Corpus and attached Memorandum, the affidavit of Donnie Andreski, the clerk's and reporter's records for cause number 16-02396-CRF-361, and all other exhibits and documents filed in the above-entitled and numbered cause.

The Court recommends that relief be **DENIED**.

The Court makes the following Findings of Fact and Conclusions of Law[1]:

FINDINGS OF FACT

1. On May 19, 2016, Applicant was indicted in cause number 16-02396-CRF-361 for the felony offense of Injury to a Child – Causing Serious Bodily Injury to a Child Under 14 —Tex. Penal Code §22.04(a)(1). (1 CR at 6). The indictment also alleged that Applicant used or exhibited a deadly weapon. (*Id.*). Applicant's case proceeded to trial on July 16, 2018. (2 RR 1).

2. On July 18, 2018, the jury convicted Applicant of Injury to a Child – Causing

[1] Regardless of how a trial court labels its findings of fact and conclusions of law, an appellate court must examine the substance of the findings and conclusions and treat them by their substance rather than by their label. *See State v. Sheppard*, 271 S.W.3d 281, 291–92 (Tex. Crim. App. 2008).

Serious Bodily Injury to a Child Under 14, and found that he used a deadly weapon. (4 CR 882, 883); (4 RR 45-46). The same day, after presentation of punishment evidence, jurors sentenced Applicant to life in the ID-TDCJ, and assessed a fine of $10,000. (4 CR 871); (4 RR 96).

3. Applicant's counsel filed a Motion for New Trial. (4 CR 858-860). The Trial Court denied that Motion on July 23, 2018. (4 CR 861).

4. Applicant was represented at trial by Donnie Andreski.

5. This Court finds that Applicant was originally represented by attorney Earl Gray. (1 CR 9-10,14).

6. This Court is very familiar with Earl Gray as an experienced criminal defense attorney who is Board Certified in Criminal Law and who was elected as the Brazos County Attorney in 2020.

7. On February 6, 2018, Earl Gray withdrew as Applicant's lawyer after Applicant filed a grievance against Gray with the State Bar of Texas. (4 CR 834-836).

8. This Court finds that on the same day of Earl Gray's withdrawal, February 6, 2018, Donnie Andreski was appointed to represent Applicant. (4 CR 837, 840).

9. This Court is very familiar with Mr. Andreski as an experienced criminal defense attorney in Brazos County, and, prior to that, as a police officer for the city of College Station for more than 20 years. Andreski's affidavit is credible,

consistent with the record, and provides this Court sufficient information to address Applicant's claims.

10. This Court finds Donnie Andreski credible in all respects. (*See* Affidavit of Donnie Andreski).

11. This Court finds that, on May 31, 2018, Andreski filed a motion to receive funds with which to retain a medical expert to assist with Applicant's case. (4 CR 841-844).

12. This Court finds that Andreski sought the assistance of an expert after his review of the extensive medical evidence in the case and Applicant's statements about how the victim's injuries occurred. (Affidavit of Donnie Andreski, p. 2).

13. This Court finds that Andreski retained Dr. Don Schaffer, Chief of Pediatrics at Texas Women's Hospital in Houston, Texas as his expert. (4 CR 841-844); (Affidavit of Donnie Andreski, p. 2).

14. This Court finds that Dr. Schaffer informed Andreski that the victim's injuries could not have been caused by an accidental fall, as Applicant claimed. (Affidavit of Donnie Andreski, p. 2).

15. This Court finds that Dr. Schaffer informed Andreski that Applicant was lying about how the victim's injuries occurred. (*Id.*).

16. This Court finds that Donnie Andreski obtained a plea offer of 25 years ID-TDCJ for Applicant, but Applicant rejected that offer and elected to proceed to trial.

(Affidavit of Donnie Andreski, p. 3); (Andreski Exhibit 3 – Email of Plea Offer).

17. This Court finds that, prior to Applicant's trial, Andreski filed an Application for Probation (4 CR 845-847) and a Motion in Limine (4 CR 848-852) on Applicant's behalf.

18. This Court finds that the evidence established that, on November 15, 2015, Applicant intentionally or knowingly caused serious bodily injury to his three-month-old daughter, E.L. Specifically, the evidence established that Applicant inflicted multiple impacts on E.L.'s head, resulting numerous severe skull fractures and significant brain injuries. (3 RR 55-62, 141-146). Further, the evidence established that Applicant squeezed E.L., resulting in multiple rib fractures. (3 RR 152-154). E.L. also suffered a badly lacerated liver, which was caused by blunt force trauma. (3 RR 79-82, 157-159). As a result of Applicant's actions, E.L. suffered massive hemorrhaging in her eyes, and will likely never fully regain sight in her left eye. (3 RR 146-150); (4 RR 64). Evidence also established that, on a previous occasion, Applicant deliberately harmed E.L., resulting in a broken arm. (3 RR 64-66, 104-105, 155-156). Finally, evidence established that E.L.'s twin brother, D.L. also suffered a skull fracture while in Applicant's care. (4 RR 63-64).

19. This Court finds that Applicant initially told medical personnel that E.L. was injured when she rolled off of a pillow and hit her head on a crib. (3 RR 66-68). Applicant next claimed that E.L. rolled off the bed and fell to the floor, possibly

striking a crib. (3 RR 68-69, 90, 92). Applicant later told a detective that E.L. was injured when he accidentally knocked a seat in which she was sitting off of a table while he was dancing. (95-96).

20. This Court finds that nine months after the offense, on August 9, 2016, Applicant reiterated to Dr. Mary Alice Conroy that E.L. was injured when he accidentally hit her seat while dancing. (Andreski Exhibit 4 – Dr. Conroy's Sanity Report, p. 3).

21. This Court finds that Applicant initially told Donnie Andreski that E.L. was injured when he accidentally failed to catch E.L. after having thrown her up in the air while playing. (Affidavit of Donnie Andreski, p. 4); (*see also* 3 RR 201 – wherein Andreski asked Dr. Bido Patel if some of E.L.'s injuries could have occurred from being repeatedly thrown in the air).

22. This Court finds that, during his trial, Applicant then told Donnie Andreski that he did what he was accused of (intentionally or knowingly causing serious bodily injury to E.L.). (Affidavit of Donnie Andreski, p. 9).

23. This Court finds that, the day after telling Donnie Andreski that he committed the offense as charged, Applicant told Mr. Andreski that E.L. was injured when he dropped her while carrying her on some stairs. (*Id.*, pp. 9-10).

24. This Court finds that the evidence overwhelmingly shows that Applicant

intentionally or knowingly caused E.L.'s injuries[2].

25. Applicant now claims that he was intoxicated at the time E.L. was injured, and that he has no memory of the offense. (Application, p. 6; Memorandum, pp. 8-9).

26. This Court finds that Applicant is **NOT CREDIBLE** for reasons including, but not limited to, the following:

- Applicant lied to medical staff about how E.L. was injured, claiming that E.L. rolled off of a bed. (3 RR 31, 67-68);

- Applicant repeated his lie about E.L. rolling off a bed to police, and when confronted with medical evidence disproving his initial story, Applicant lied again, claiming that E.L. was hurt when he accidentally knocked her off of a table while dancing. (3 RR 95-96);

- Applicant initially told police that E.L. had never been injured in his care before the date of the offense. (3 RR 92, 105). Yet, when confronted with the fact that E.L. had older breaks of both bones in her left arm, Applicant told police that he had previously dropped E.L., and had since felt that something was wrong with E.L.'s left hand[3]. (3 RR 105-106);

- Prior to his trial, Applicant told Donnie Andreski that E.L. was accidentally injured while he played with her by throwing her up in the air. (Affidavit of Donnie Andreski, p. 4); (*see also* 3 RR 201);

- During trial, Applicant told Donnie Andreski that he deliberately hurt E.L., only to later state his intention to testify that E.L. was hurt when he accidentally dropped her down some stairs because he felt that story

[2] Note that Applicant now concedes in his Application for Writ of Habeas Corpus that evidence of his guilt for intentionally or knowingly causing serious bodily injury to E.L. is "overwhelming." (Memorandum, p. 6).

[3] Note that two different doctors testified that E.L.'s broken arm could not have occurred as a result of an accidental fall. (3 RR 55-56, 155-156).

was "more believable" than his previous explanations. (Affidavit of Donnie Andreski, pp. 9-10); (Andreski Exhibit 1 – Note from Donnie Andreski to his file); (4 RR 7-8);

- Contrary to his current claim that he was intoxicated at the time of the offense, Applicant specifically denied being intoxicated at the time of the offense to Dr. Mary Alice Conroy. (*See* Andreski Exhibit 4 – Sanity Report of Dr. Conroy);

- Applicant has previously committed two thefts. (4 RR 50-51); (State's Exhibits 62 & 63 – 9 RR 121-130);

- Applicant's current claim of being intoxicated and experiencing a "blackout" on the date of E.L.'s massive injuries fails to account for E.L.'s previously broken arm, which she suffered while in Applicant's care, nor does it account for the skull fracture suffered by E.L.'s twin brother, D.L. (*See* 3 RR 63-64); (3 RR 105-106); (4 RR 63); (*See also* State's Exhibit 2 – 9 RR 22 – showing that E.L. "fell from a height" while being held by Applicant and "struck the bed" and the floor approximately two months prior to the offense).

Grounds One & Two – Ineffective Assistance of Counsel Related to Mitigation

27. In **Ground One** alleged in the Application, Applicant complains that Donnie Andreski rendered ineffective assistance in that he failed to prepare, investigate, and present evidence of Applicant's voluntary intoxication as mitigating evidence, and failed to seek a temporary insanity instruction pursuant to Tex. Penal Code §8.04(c). (Application, p. 6); (Memorandum, pp. 8-11).

28. In **Ground Two** alleged in the Application, Applicant complains that Donnie Andreski rendered ineffective assistance in that he failed to discover, investigate, prepare, and present mitigating evidence concerning Applicant's mental health and background. (Application, p. 8); (Memorandum, pp. 11-16).

29. This Court finds that, in his credible affidavit, Donnie Andreski refutes Applicant's claims of ineffective assistance of counsel for failing to prepare, investigate, and present mitigating evidence. (Affidavit of Donnie Andreski, pp. 3-17).

Ground One – Evidence of Applicant's Voluntary Intoxication

30. This Court finds that Applicant, who is **not credible**, now claims that he had been smoking K2 throughout the day his infant daughter, E.L., was severely injured. (Memorandum, p. 8). Applicant further claims that, due to his drug use, he has "no cogent recollection of exactly what occurred." (*Id.*). Finally, Applicant now states that he fabricated the story of an accidental fall due to his fear of getting in trouble for using illegal drugs while caring for his twin infant children. (*Id.*).

31. Applicant now claims that his drug use caused him to experience a "blackout, where he was unaware of and unable to rationally exercise control over his actions." (Memorandum, p. 9). Thus, Applicant contends that he was entitled to an instruction on temporary insanity pursuant to Tex. Penal Code §8.04(c). (*Id.*); *see Reyna v. State*, 11 S.W.3d 401, 403 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (stating that it is well settled that lack of memory is not the same thing as intoxication; thus, evidence showing loss of memory is not sufficient to require an instruction on temporary insanity.").

32. This Court finds that Applicant never told Donnie Andreski that he was intoxicated at the time E.L. was injured. (Affidavit of Donnie Andreski, pp. 4-5).

33. This Court finds that Applicant never told Donnie Andreski that he had no memory of how E.L. was hurt. (*Id.*).

34. This Court finds that Applicant has failed to assert in his Application or Memorandum that he ever told Andreski that he was intoxicated at the time E.L. was injured. (*See* Application & Memorandum).

35. This Court finds that Applicant has presented no evidence, either from Applicant himself or other sources, that Donnie Andreski had any reason to believe that Applicant was intoxicated at the time of the offense.

36. This Court finds that Applicant specifically denied to Dr. Mary Alice Conroy, who evaluated Applicant for competence and sanity, that he was intoxicated at the time of the offense. (Andreski Exhibit 4 – Sanity Report of Dr. Conroy, p. 3).

37. This Court finds that, contrary to claiming he had no memory of what occurred, Applicant gave Donnie Andreski various specific accounts of how E.L. suffered her injuries. (Affidavit of Donnie Andreski, pp. 4, 9-10).

38. This Court finds that Applicant has failed to allege that any witness, other than Applicant himself, could have testified to Applicant's drug use or state of

intoxication at the time of the offense[4]. (*See* Application, pp. 6, 8; Memorandum, pp. 8-11).

39. This Court finds that Applicant himself is the only person who could have testified about his drug use or state of intoxication at the time of the offense. (*See Ex parte Martinez*, 195 S.W.3d 713, 728 (Tex. Crim. App. 2006); *Garley v. State*, Nos. 13-20-00336-CR, 13-20-00337-CR, 2022 Tex. App. LEXIS 4506, *26 (Tex. App. – Corpus Christi June 30, 2022, no pet. history) (not designated for publication)); (*see also* Affidavit of Donnie Andreski, pp. 8-9).

40. This Court finds that Donnie Andreski initially intended on calling Applicant to testify during the guilt phase of Applicant's trial about the circumstances under which E.L. was injured. (Affidavit of Donnie Andreski, pp. 8-9) (stating, "[S]ince Applicant and his children were the only people present when the offense occurred, Applicant himself was the only person who could have testified as to the circumstances under which E.L. was injured.").

41. This Court finds that Donnie Andreski's trial strategy during the guilt phase of Applicant's trial was to seek a conviction on a lesser-included reckless or negligent injury to a child. (Affidavit of Donnie Andreski, p. 9); (*see also* 4 RR 37-38 – wherein Andreski argued, "We're not here to ask you to find Kevin not guilty

[4] While Applicant points to certain records wherein he or his girlfriend, Markeshia Burton, acknowledged his previous drug use in general, Applicant has provided no evidence relating to his drug use or state of intoxication on the date of the offense. (*See* Memorandum, p. 10).

of anything at all today. We are here to ask you...find him guilty of negligent conduct or at the very most reckless conduct...").

42. This Court finds that Donnie Andreski asked for and received lesser-included instructions of both reckless and negligent injury to a child in the jury charge. (4 RR 11); (4 CR 876).

43. This Court finds that, based upon his intended strategy of having Applicant testify about the incident, Donnie Andreski told jurors during his opening statement that Applicant would testify. (3 RR 25-26). Additionally, Applicant himself stated on the record that he intended to testify, and that he and Mr. Andreski had consulted about that decision. (3 RR 203-205).

44. This Court finds that Donnie Andreski intended for Applicant to testify at both the guilt and punishment phases of trial. (Affidavit of Donnie Andreski, pp. 11, 14).

45. This Court finds that, during the State's case-in-chief, Applicant told Donnie Andreski that he did what he is accused of, and that he wished to ask for mercy during his testimony. (Affidavit of Donnie Andreski, p. 9); (*See also* Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's actions).

46. This Court finds that, on the morning he was scheduled to testify, Applicant told Donnie Andreski that he intended to testify that he accidentally dropped E.L. down some stairs because he felt that story was "more believable" than his previous

claims. (Affidavit of Donnie Andreski, pp. 9-10); (*See also* Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's actions).

47. This Court finds that Applicant's new claim that he dropped E.L. down stairs was different than anything he had previously told Donnie Andreski, police, medical personnel, or Dr. Mary Alice Conroy, and came after Applicant informed Andreski the day before that he did what he was accused of. (Affidavit of Donnie Andreski, pp. 9-10); (3 RR 31, 67-68, 95-96); (Andreski Exhibit 4 – Dr. Conroy's Sanity Report).

48. This Court finds that Donnie Andreski affirmatively knew that Applicant intended to lie on the witness stand. (*See* Affidavit of Donnie Andreski, pp. 9-10); (s*ee also* Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's conduct); s*ee also Maddox v. State*, 613 S.W.2d 275, 277, 284 (Tex. Crim. App. 1980) (wherein defense counsel was not ineffective for seeking to withdraw and allowing a defendant to testify in narrative form when the lawyer affirmatively knew his client intended to lie on the witness stand).

49. This Court finds that Donnie Andreski advised Applicant of the potential consequences of lying on the witness stand, including possible prosecution for Aggravated Perjury, and advised Applicant not to testify in such a fashion. (*Id.*).

50. This Court finds that, even after being admonished about the consequences of lying on the witness stand, Applicant told Donnie Andreski that he still intended to tell jurors he dropped E.L. down some stairs. (*Id.*).

51. This Court finds that, in an attempt to avoid knowingly sponsoring perjured testimony, Donnie Andreski moved to withdraw as Applicant's counsel. (*Id.*); (4 RR 7-8); *See also Maddox*, 613 S.W.2d at 277, 284.

52. This Court finds that the trial judge denied Donnie Andreski's Motion to Withdraw, but permitted Applicant to testify in narrative form. (4 RR 7-9); *See also Maddox*, 613 S.W.2d at 277, 284.

53. This Court finds that, immediately after the trial judge informed Applicant that he could testify in narrative form, the jury was brought into the courtroom and Applicant then told Donnie Andreski that had changed his mind and no longer wished to testify. (Affidavit of Donnie Andreski, p. 11); (4 RR 9).

54. This Court finds that the following exchange occurred outside the presence of the jury between Donnie Andreski and Applicant shortly after Applicant decided not to testify:

> Andreski: Mr. Lucien, you just heard me stand up and rest our case to the jury, correct?
>
> Applicant: Yes.
>
> Andreski: And that was after I told the Judge that you had intended to testify, correct?
>
> Applicant: Yes.

Andreski: Did you tell me once the jury entered the room that you had changed your mind and you did not want to testify?

Applicant: Yes.

Andreski: That you were going to heed my advice and not testify?

Applicant: Yes.

(4 RR 10-11).

55. This Court finds that, following Applicant's decisions to lie and then not testify, Donnie Andreski was left with no means of presenting alternate or additional information about the circumstances under which E.L. was injured, including whether Applicant was under the influence of drugs at the time of the offense. (*See* Findings of Fact 32-40)

56. This Court finds that, immediately before the jury's guilty verdict was read, the following exchange occurred between Donnie Andreski and Applicant outside the presence of the jury:

Andreski: And before [the jurors] come in can we put a little more testimony about testifying on the record too?

Kevin, we just got through talking about what the punishment phase is all about, correct?

Applicant: Yes.

Andreski: If they find you guilty, we are going to proceed to the punishment phase. And in that phase you do have the option to testify in your punishment phase. Do you understand that?

Applicant: Yes.

Andreski: And I discussed with you whether or not you wanted to do that. I told you what my advice was. Do you plan on testifying at your punishment phase?

Applicant: No.

Andreski: And is that -- that answer no, is that not testifying your choice and your choice alone?

Applicant: Yes.

Andreski: Did you listen to my advice and take it into account and then make the decision on your own?

Applicant: Yes.

(4 RR 43-44).

57. This Court finds that Applicant himself knowingly and voluntarily decided not to testify in his trial. (4 RR 10-11; 43-44).

58. This Court finds that, despite Applicant's last-moment decision not to testify, Donnie Andreski argued for jurors to convict Applicant of a lesser-included offense of either reckless or negligent injury to a child. (4 RR 32-38).

59. This Court finds that Applicant's claims that he was intoxicated at the time of the offense, that he has no memory of the offense, and that he was unaware of his actions in inuring E.L. are **not credible**. (*See* Finding of Fact 26).

60. This Court finds that, beyond his own claims of being intoxicated at the time of the offense, Applicant has provided no evidence that he was under the influence of drugs *when E.L. was injured.* (*See* Applicant's Appendix A – Dr. Conroy's

Competency Report, pp. 2, 3 - stating that Applicant claimed he was a regular user of marijuana and K2); (*see also* Andreski Exhibit 4 – Dr. Conroy's Sanity Report, p. 3 - stating that, while Applicant claimed to be a regular drug user, he denied that he was under the influence of drugs or intoxicated at the time of the offense); (*see also* State's Exhibit 1 – E.L.'s Medical Records - 5 RR 67 – showing that E.L.'s mother reported to authorities that Applicant uses marijuana).

61. This Court finds that Applicant has presented no evidence that intoxication rendered him unaware of the wrongfulness of his actions in injuring E.L. *See Martinez*, 195 S.W.3d at 728 (stating "To be entitled to the mitigating instruction based on voluntary intoxication, it must be shown that the convicted person was unable to understand the wrongfulness of his conduct."); *see also Reyna*, 11 S.W.3d at 403 (stating that lack of memory does not entitle a defendant to an instruction pursuant to Tex. Penal Code §8.04(c).

62. This Court finds that Donnie Andreski's performance was not deficient for failing to present evidence that Applicant was intoxicated at the time of the offense, or for failing to seek a temporary insanity instruction pursuant to Tex. Penal Code §8.04(c).

63. This Court finds that, even if Donnie Andreski's performance had been deficient in failing to present evidence of Applicant's drug use to the jury and in

failing to seek an instruction pursuant to Tex. Penal Code §8.04, Applicant was not prejudiced by that performance.

Ground Two - Evidence Pertaining to Applicant's Mental Health and Background

64. This Court finds that, at the time trial began, Donnie Andreski intended for Applicant to testify both in the guilt and punishment phases. (Affidavit of Donnie Andreski, pp. 9, 11); (*See also* 3 RR 205).

65. This Court finds that Donnie Andreski intended to have Applicant testify about his background, including his troubled childhood, lack of education, and history of mental health treatments. (Affidavit of Donnie Andreski, pp. 11-12, 14-15); (*see also* 3 RR 25 – wherein Andreski described Applicant's lack of education in opening statement).

66. This Court finds that Donnie Andreski sought to obtain information from Applicant concerning his family and educational history background, and specifics related to his mental health history. (Affidavit of Donnie Andreski, pp.12-14).

67. This Court finds that Donnie Andreski asked Applicant for the names of family members, friends, or co-workers who might testify to mitigating information on Applicant's behalf. (*Id.* at p. 14).

68. This Court finds that Applicant did not provide Donnie Andreski with the names of anyone who might provide mitigating testimony on his behalf, other than his adoptive mother who lives in Haiti, and his adoptive brother and sister, who live

in Georgia. (*Id.*, pp. 12-13).

69. This Court finds that Applicant failed to provide Donnie Andreski with detailed information concerning his background and his history of mental health treatments. (Affidavit of Donnie Andreski, pp. 12-14). *See Martinez*, 195 S.W.3d at 737 (stating, **a defendant...has some obligation to assist his trial counsel in investigating his background information. When such a defendant is not forthcoming with this information, he risks that it will not be presented at his trial.**") (emphasis added).

70. This Court finds that Applicant informed Donnie Andreski that he had been treated for bi-polar disorder, but could not tell Mr. Andreski where, when, or by whom he was treated, instead stating that his adoptive mother in Haiti would have that information. (*Id.*, p. 14); *see Martinez*, 195 S.W.3d at 737.

71. This Court finds that Donnie Andreski obtained phone numbers for, and repeatedly called, Applicant's adoptive mother in Haiti and sister in Georgia. (Affidavit of Donnie Andreski, p. 13). Mr. Andreski left Applicant's family members voicemails explaining why he wished to speak with them. (Affidavit of Donnie Andreski, p. 13). Mr. Andreski began trying to reach Applicant's family members on June 1, 2018, approximately six weeks before Applicant's trial began. (*Id.*). Applicant's family members never responded to Mr. Andreski. (*Id.*).

72. This Court finds that, the day before Applicant's trial began, Donnie Andreski

made a "last-ditch" search for Applicant's family members on Facebook and sent messages to Applicant's adoptive mother, sister, and brother. (*Id.* at pp. 13-14). Mr. Andreski never received a response from Applicant's family members. (*Id.*).

73. This Court finds that Donnie Andreski reasonably believed that Applicant himself could testify about his own background, lack of education, and history of mental health treatment. (*See Id.*, p. 14).

74. This Court finds that, prior to trial, Donnie Andreski specifically intended to have Applicant testify about his childhood in foster care, that he only completed the 8th grade in school, and that he had previously received mental health treatment. (*Id.*, pp. 14-15).

75. This Court finds that, as early as opening statement during the guilt-phase of Applicant's trial, Donnie Andreski began trying to get mitigating evidence about Applicant's background before the jury, stating:

> You're going to hear that this 22-year-old man who only completed the 8th grade as part of his formal education and then later managed to get a GED was scared to death. He didn't know how to be a dad. He probably shouldn't have been a dad at that point.

(3 RR 25).

76. This Court finds that, had Applicant testified as planned during trial, Donnie Andreski would have asked Applicant about his childhood experiences in foster care, his educational background, and his history of mental health treatments. (*See* Affidavit of Donnie Andreski, pp. 11, 14-15, 17).

77. This Court finds that, after Applicant's trial commenced, Applicant indicated to Donnie Andreski that he intended to lie on the witness stand by claiming that he had dropped E.L. down some stairs, because that story was "more believable." (*Id.*, pp. 9-10); (Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's behavior); (*see also* 4 RR 7-8).

78. This Court finds that, when Applicant indicated his intention to lie on the witness stand, Donnie Andreski first attempted to withdraw, and then stated to the trial judge, "My client has informed me that he wishes to testify this morning. **I cannot sponsor that testimony**. I'll simply call him to the witness stand, Your Honor." (4 RR 7-8) (emphasis added).

79. This Court finds that Applicant then changed his mind about testifying as jurors were being brought into the courtroom. (Affidavit of Donnie Andreski, p. 11); (4 RR 9, 11).

80. This Court finds that, as a result of Applicant's decision not to testify, Donnie Andreski rested the Defense's case. (*Id.*).

81. This Court finds that Applicant himself knowingly and freely decided not to testify during either the guilt or punishment phases of his trial, as shown by the following exchanges:

> Andreski: Mr. Lucien, you just heard me stand up and rest our case to the jury, correct?
>
> Applicant: Yes.

Andreski: And that was after I told the Judge that you had intended to testify, correct?

Applicant: Yes.

Andreski: Did you tell me once the jury entered the room that you had changed your mind and you did not want to testify?

Applicant: Yes.

Andreski: That you were going to heed my advice and not testify?

Applicant: Yes.

(4 RR 10-11);

Andreski: And before [the jurors] come in can we put a little more testimony about testifying on the record too?

Kevin, we just got through talking about what the punishment phase is all about, correct?

Applicant: Yes.

Andreski: If they find you guilty, we are going to proceed to the punishment phase. And in that phase you do have the option to testify in your punishment phase. Do you understand that?

Applicant: Yes.

Andreski: And I discussed with you whether or not you wanted to do that. I told you what my advice was. Do you plan on testifying at your punishment phase?

Applicant: No.

Andreski: **And is that -- that answer no, is that not testifying your choice and your choice alone?**

Applicant: **Yes.**

Andreski: **Did you listen to my advice and take it into account and then make the decision on your own?**

Applicant: **Yes.**

(3 RR 44-45) (emphasis added).

82. This Court finds that, after trial commenced, Applicant informed Donnie Andreski that he had committed the charged offense of intentionally or knowingly injuring E.L. (Affidavit of Donnie Andreski, pp. 9-10); (Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's actions).

83. This Court finds that, prior to Applicant's revelation to Donnie Andreski that he was guilty of the charged offense, both Applicant and Mr. Andreski had agreed that Applicant would testify in both the guilt and punishment phases of trial. (*See* Affidavit of Donnie Andreski, pp. 11, 14, 17); (*see also* 3 RR 24-26 – Donnie Andreski's opening statement informing jurors that Applicant would testify); (*see also* 3 RR 203-206 – Applicant stating his intention to testify).

84. This Court finds that, upon Applicant's revelation to Donnie Andreski during trial that he was guilty of the charged offense, Andreski advised Applicant to "sleep on" his decision to testify. (Affidavit of Donnie Andreski, pp. 9-10); (Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's actions).

85. This Court finds that, immediately after the State rested its case in guilt, Donnie Andreski questioned Applicant about whether he intended to testify:

Andreski: Mr. Lucien, would you state your name, please.

Applicant: Kevin Lucien.

Andreski: Speak a little louder.

Applicant: Kevin Lucien.

Andreski: Kevin, I want to ask you a couple questions about our conversations about whether or not you were going to take the stand and testify on your own behalf, okay?

Applicant: Yes.

Andreski: Did I talk to you last week in the jail about whether or not you were going to testify in this case?

Applicant: Yes.

Andreski: Did I inform you that the decision to testify is entirely yours?

Applicant: Yes.

Andreski: That no one can force you to do that, correct?

Applicant: Yes.

Andreski: And that no one can hold it against you if you don't testify, correct?

Applicant: Yes.

Andreski: Did we discuss some reasons why you might want to testify?

Applicant: Yes.

Andreski: Did we discuss some reasons why you might not want to testify?

Applicant: Yes.

Applicant: Did I again check with you this morning before I made my brief opening statement and ask you if you still wanted to testify?

Applicant: Yes.

Andreski: And was your answer, yes, that you still intended to testify?

Applicant: Yes.

Andreski: And I told you then that I would be committing you for the most part if I told the jury you were going to testify, right?

Applicant: Yes.

Andreski: **Do you intend to testify in the morning?**

Applicant: **Yes.**

Andreski: **On your own behalf?**

Applicant: **Yes, sir.**

Andreski: **Is that decision yours?**

Applicant: **Yes.**

Andreski: **And yours alone?**

Applicant: **Yes.**

Andreski: Did you base that decision on input from me?

Applicant: Yes.

Andreski: No other questions.

(3 RR 204-205) (emphasis added).

86. This Court finds that, prior to trial and up until Applicant's revelation to Donnie Andreski that he was guilty, Applicant and Mr. Andreski had agreed that

Applicant would testify in both the guilt and punishment phases of trial. (Affidavit of Donnie Andreski, pp. 11, 14, 17); (3 RR 24-26, 203-205).

87. This Court finds that on the morning, July 18, 2018, Applicant informed Donnie Andreski that he intended to testify to a false story that he accidentally dropped E.L. down some stairs. (Affidavit of Donnie Andreski, pp. 9-10); (Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's actions); (4 RR 7-9).

88. This Court finds that Donnie Andreski declined to sponsor Applicant's testimony upon learning of Applicant's intent to lie on the witness stand. (Affidavit of Donnie Andreski, pp. 10-12, 15-17); (Andreski Exhibit 1 – Donnie Andreski's note to his file documenting Applicant's actions); (4 RR 7-9).

89. This Court finds that, despite a previously agreed-upon trial strategy of Applicant testifying in both the guilt and punishment phases of trial, Applicant himself freely and knowingly decided after his trial began that he would not testify in either phase, thereby depriving Donnie Andreski of the only available source of mitigating evidence at that point. (4 RR 10-11, 44-45).

90. This Court finds that Applicant's claim that Donnie Andreski "made no investigation into" evidence of Applicant's background is **NOT CREDIBLE**, for reasons including, but not limited to, the following:

- Applicant's claim is contradicted by the credible affidavit of Donnie Andreski; (Affidavit of Donnie Andreski, pp. 12-14);

- Donnie Andreski attempted to obtain additional information about Applicant's background from Applicant himself; (*Id.*);

- Donnie Andreski repeatedly attempted to contact and obtain information from Applicant's adoptive family; (*Id.*); (Andreski Exhibit 2 – Facebook messages to Applicant's family members);

- Applicant and Andreski agreed before trial that Applicant would testify on his own behalf, which would have included providing evidence of Applicant's background and mental health history; (Affidavit of Donnie Andreski, pp. 11, 14, 17); (3 RR 24-26, 203-205);

- Applicant himself declined to testify; (4 RR 10-11, 44);

- All the reasons listed in Finding of Fact Number 26, wherein the Court found Applicant **NOT CREDIBLE**. (*See* Finding of Fact 26).

91. This Court finds that, other than Applicant's own testimony, Applicant has presented no evidence, either through witnesses or admissible documents, which Donnie Andreski could have presented as to Applicant's background[5]. (*See* Memorandum, pp. 1-16); (*see also* Applicant's Appendix A – Competency Report of Dr. Mary Alice Conroy); *see also Lively v. State,* No. 12-10-00288-CR, 2011 Tex. App. LEXIS 5885, at *14-15 (Tex. App. – Tyler July 29, 2011, no pet.) (not designated for publication) (stating "**Without a showing as to what the missing mitigation evidence or witnesses would**

[5] Note that, while Applicant points to his own description of his background to Dr. Conroy in her Competence Report, such information would have constituted self-serving hearsay absent Applicant testifying. (*See* Conclusions of Law 22-24); *see also* Tex. R. Evid. 802.

be, we cannot conclude that counsel was ineffective for failing to uncover or present them.") (emphasis added).

92. This Court finds that Donnie Andreski's performance was not deficient with respect to his investigation and strategy regarding mitigating evidence of Applicant's background.

93. This Court finds that Applicant was not prejudiced by Donnie Andreski's performance with respect investigating and presenting mitigating evidence.

CONCLUSIONS OF LAW

1. Habeas corpus is available to review only jurisdictional defects, or a denial of one's fundamental or constitutional rights. *Ex parte Russell,* 738 S.W.2d 644 (Tex. Crim. App. 1986). In addition, in seeking habeas corpus relief, Applicant assumes the burden of proving his factual allegations by a preponderance of the evidence. *Ex parte Adams*, 768 S.W.2d 281, 287-288 (Tex. Crim. App. 1989).

Ineffective Assistance of Counsel

2. The Sixth Amendment to the United States Constitution guarantees the right to the reasonably effective assistance of counsel in criminal prosecutions. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); see U.S. CONST. amend. VI.

3. To prove a claim of ineffective assistance of counsel, Applicant must show that (1) his trial counsel's performance fell below an objective standard of

reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

4. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

5. In reviewing counsel's performance, the totality of the representation must be considered to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance or trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482-83 (Tex. Crim. App. 2006).

6. Applicant has the burden to establish both prongs of *Strickland* by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

7. Applicant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

8. In applying the two-prong *Strickland* test the Supreme Court has noted:

> ...a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an

> ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed....

Strickland, 466 U.S. at 697.

9. Hindsight analysis is not permitted in determining whether trial strategy was sound. *See United States v. Mullins*, 315 F.3d 449, 456 fn. 24 (5th Cir. 2002); *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App.), cert. denied, 506 U.S. 885 (1992) (stressing need to avoid "distorting effects of hindsight").

10. Just because another attorney would have handled a case or situation differently does not render the trial attorney's performance ineffective. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979).

11. The right to effective assistance of counsel does not mean the right to errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006).

12. While a single egregious error of commission or omission may constitute ineffective assistance, reviewing courts are hesitant to declare counsel ineffective based on a single alleged miscalculation. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

13. In determining whether counsel was ineffective, reviewing courts should inquire into trial strategy only if it appears from the record that counsel's actions had no plausible basis in strategy or tactic. *Ex parte Ewing*, 570 S.W.2d 941, 945 (Tex. Crim. App. 1978).

14. An error in trial strategy will be considered inadequate representation only if counsel's actions are without any plausible basis. *Ex parte Burns,* 601 S.W.2d 370, 372 (Tex. Crim. App. 1980).

15. The same two-prong *Strickland* standard of review to claims of ineffective assistance of counsel is applied during both the guilt and punishment phases of trial. *Hernandez v. State*, 988 S.W.2d 770, 772-74 (Tex. Crim. App. 1999).

16. This Court concludes that Applicant would only have been entitled to an instruction on temporary insanity due to voluntary intoxication pursuant to Tex. Penal Code §8.04 if evidence tended to show both that Applicant was intoxicated at the time of the offense, and that Applicant's voluntary intoxication caused him (1) not to know his conduct was wrong or (2) it caused him to be incapable of conforming his conduct to the requirements of the law he violated." *Cordova v. State*, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987) (en banc); *see* Tex. Penal Code §§ 8.01(a), 8.04.

17. This Court concludes that evidence of intoxication, "even gross intoxication," is not sufficient to require a mitigating instruction. *Arnold v. State*, 742 S.W.2d 10, 13 (Tex. Crim. App. 1987); *see Cordova*, 733 S.W.2d at 190.

18. This Court further concludes that "it is well settled that lack of memory is not the same thing as intoxication; thus, evidence showing loss of memory is not sufficient to require an instruction on temporary insanity." *Reyna*, 11 S.W.3d at 403;

intoxication pursuant to Tex. Penal Code §8.04(c), or presented that he was raised in foster care, had been treated for bi-polar disorder, and only completed eighth grade, Applicant has failed to establish a reasonable probability that the outcome of the trial would have been different, given the egregious nature of Applicant's conduct in severely beating both his infant twins, and permanently injuring E.L.. *See Strickland*, 466 U.S. at 694 (stating that, to establish prejudice, Applicant has the burden of showing a reasonable probability that, but for his lawyer's deficient performance, the result of the trial would have been different.).

22. This Court concludes that self-serving declarations are not admissible in evidence as proof of the facts asserted. *See Hafdahl v. State*, 805 S.W.2d 396, 402 (Tex. Crim. App. 1990); *Crane v. State*, 786 S.W.2d 338, 353-54 (Tex. Crim. App. 1990); *Allridge v. State*, 762 S.W.2d 146, 152 (Tex. Crim. App. 1988); *Chambers v. State*, 905 S.W.2d 328, 330 (Tex. App.-Fort Worth 1995, no pet.); *State v. Morales*, 844 S.W.2d 885, 891-92 (Tex. App.-Austin 1992, no pet.).

23. This Court concludes that exceptions to the general prohibition of admitting self-serving hearsay include the following: (1) when part of the statement was previously offered by the State; (2) when the statement was necessary to explain or contradict acts or declarations first offered by the State; or (3) when the accused's self-serving declaration was part of the res gestae of the offense or arrest. *See*

Allridge, 762 S.W.2d at 152; *Singletary v. State*, 509 S.W.2d 572, 576 (Tex. Crim. App. 1974).

24. This Court concludes that the competence and sanity reports of Dr. Mary Alice Conroy (Applicant's Appendix A & Andreski Exhibit 4), which documented Applicant's statements to Conroy concerning his background and history, would have constituted inadmissible self-serving hearsay had Donnie Andreski sought to offer them to establish the truth of Applicant's statements therein. *Hafdahl*, 805 S.W.2d at, 402; *Crane*, 786 S.W.2d at 353-54; *Allridge*, 762 S.W.2d at 152.

25. This Court concludes that an attorney also must an adequate investigation into potential mitigation evidence. *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003).

26. This Court concludes that an attorney's decision not to investigate or to limit the scope of the investigation is given a "heavy measure of deference" and is assessed in light of all of the circumstances to determine whether reasonable professional judgment would support the decision. *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066.

27. This Court concludes that a claim of ineffective assistance based on trial counsel's failure to call or interview witnesses or present evidence cannot succeed absent a showing both that the witnesses or evidence were available and that they would have benefited the defendant. *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex.

Crim. App. 2007); *Cate v. State*, 124 S.W.3d 922, 927 (Tex. App.—Amarillo 2004, pet. ref'd); *see also Lively,* 2011 Tex. App. LEXIS 5885, at *14-15 (stating "**Without a showing as to what the missing mitigation evidence or witnesses would be, we cannot conclude that counsel was ineffective for failing to uncover or present them.**") (emphasis added).

28. The Court concludes that it is not permitted to speculate about evidence which was not presented. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

29. The Court concludes that a claim for ineffective assistance based on trial counsel's failure to investigate the facts of the case fails absent a showing of what the investigation would have revealed that reasonably could have changed the result of the case. *Moore v. State*, No. 06-16-00144-CR, 2018 Tex. App. LEXIS 2210, at *10 (Tex. App. Mar. 28, 2018) (not designated for publication); *see also Perez v. State,* 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (stating "[F]ailure to call witnesses is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony.") .

30. This Court concludes that Donnie Andreski's investigation into Applicant's background was reasonable, in that he:

- Questioned Applicant in an effort to obtain details about Applicant's background, education, and history of mental health;
- Repeatedly sought to contact Applicant's adoptive mother, who lives in Haiti, and adoptive sister, who lives in Georgia;

- Sought to contact Applicant's adoptive brother, who lives in Georgia;
- Questioned Applicant about whether he had any family, friends, or co-workers who might offer mitigating testimony;
- Decided to have Applicant himself testify as to his background.

(Affidavit of Donnie Andreski, pp. 12-15);

31. This Court concludes that "**a defendant...has some obligation to assist his trial counsel in investigating his background information. When such a defendant is not forthcoming with this information, he risks that it will not be presented at his trial.**" *Martinez*, 195 S.W.3d at 737 (emphasis added).

32. This Court concludes that Applicant has presented no admissible evidence concerning his background and mental health history that could have been presented, beyond his own potential testimony. (*See* 4 RR 10-11, 44-45) (wherein Applicant elected not to testify in either the guilt or punishment phases of his trial); *see also Martinez*, 195 S.W.3d at 728 (noting that the defendant was the only person who could have testified about abuse he claimed to have suffered in childhood);

33. This Court concludes that Applicant has failed to show by a preponderance of the evidence that Donnie Andreski's performance was deficient in any respect.

34. This Court concludes that Applicant has failed to show by a preponderance of the evidence that he was prejudiced by Donnie Andreski's performance, even if that performance was deficient. *See Strickland*, 466 U.S. at 697 (stating:

> a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed).

ORDER

This Court hereby ORDERS the District Clerk of Brazos County prepare and transmit the Record herein to the Court of Criminal Appeals as provided by Tex. Code Crim. Proc. art. 11.07, which shall include:

1. The Applicant's pleadings, including his Application for Writ of Habeas Corpus pursuant to Article 11.07 and the attached Memorandum and exhibits (Applicant's Appendices A-C);

2. The affidavit of Donnie Andreski;

3. All exhibits, including:

   - Applicant's Appendices A-C;
   - Andreski Exhibits 1-4;

4. Any orders entered by the convicting court;

5. This Court's Findings of Fact and Conclusions of Law;

6. The indictment, judgment, sentence, docket sheet unless they have been been previously forwarded to the Court of Criminal Appeals.

It is further ORDERED that the District Clerk shall forward a copy of this Court's Findings of Fact and Conclusions of Law to: Kevin Leon Lucien,

TDCJ#2211511, French Robertson Unit – ID-TDCJ, 12071 F.M. 3522 Abilene, Texas 79610.

SIGNED this 26th day of July, 2022.

David Hilburn
Presiding Judge

KEVIN LEON LUCIEN, Appellant v. THE STATE OF TEXAS, Appellee
COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO
2020 Tex. App. LEXIS 2079
No. 10-18-00241-CR
March 11, 2020, Opinion Delivered
March 11, 2020, Opinion Filed

Notice:

PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Petition for discretionary review refused by In re Lucien, 2020 Tex. Crim. App. LEXIS 722 (Tex. Crim. App., Sept. 23, 2020)US Supreme Court certiorari denied by Lucien v. Texas, 2021 U.S. LEXIS 2414 (U.S., May 17, 2021)

Editorial Information: Prior History

From the 361st District Court, Brazos County, Texas. Trial Court No. 16-02396-CRF-361.

Disposition:
Affirmed.

Judges: Before Chief Justice Gray, Justice Davis, and Justice Neill.

Opinion

Opinion by: TOM GRAY

Opinion

MEMORANDUM OPINION

Kevin Lucien appeals from a conviction for injury to a child with serious bodily injury. Tex. Penal Code Ann. § 22.04(a)(1), (e). In his sole issue, Lucien complains that he received ineffective assistance of counsel due to his counsel's failure to object to the introduction of medical records which constituted hearsay and contained improper evidence of extraneous bad acts committed against the victim's twin brother and mother as well as evidence of a CPS proceeding. Because we find no reversible error, we affirm the judgment of the trial court.

Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, an appellant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). First, the appellant must show

that counsel was so deficient as to deprive appellant of his Sixth Amendment right to counsel. *Strickland*, 466 U.S. at 687. Second, the appellant must show that the deficient representation was prejudicial and resulted in an unfair trial. *Id.* To satisfy the first prong, the appellant must show that his counsel's representation was objectively unreasonable. *Id.*; *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). To satisfy the second prong, the appellant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thompson*, 9 S.W.3d at 812. A reasonable probability exists if it is enough to undermine the adversarial process and thus the outcome of the trial. *See Strickland*, 466 U.S. at 694; *Mallett v. State*, 65 S.W.3d 59, 62-63 (Tex. Crim. App. 2001).

A failure to make a showing under either prong of *Strickland* defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003). Thus, we need not examine both prongs if one cannot be met. *Strickland*, 466 U.S. at 697.

The appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. *Thompson*, 9 S.W.3d at 813. The appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective, and an allegation of ineffectiveness must be firmly founded in the record. *Thompson*, 9 S.W.3d at 813.

Lucien argues that his counsel's failure to object to an exhibit containing medical records that was admitted without objection constituted ineffective assistance because the records contained hearsay and inadmissible evidence of the following extraneous bad acts allegedly committed by him: (1) harm to the victim's twin including pinch marks, bruising, scalp swelling, and a skull fracture; (2) multiple references to domestic violence committed against the victim's mother and elder sibling and marijuana use; and (3) references to the placement of the children with CPS in foster care. Nothing in the records shows that the jury ever saw the records at the time they were admitted into evidence or at any time after their admission.

The victim, a three month old infant who was born prematurely at 33 weeks, was admitted to the hospital with what was ultimately found to be skull fractures on both sides of the head, brain bleeding, broken ribs, a lacerated liver, retinal hemorrhages of the right eye, pre-retinal hemorrhages of the left eye which required surgery to prevent loss of vision, bruising on the nose, petechial bruising on one side of the neck, and an old arm fracture. Lucien admitted to being the victim's sole caregiver and attempted to give various explanations for the injuries which were not consistent with the severity of the child's injuries. Because there is no evidence that the jury ever saw the records and there was overwhelming evidence of his guilt, Lucien has not shown how there is "a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different" as required to prevail under the second prong of *Strickland*. *See Thompson*, 9 S.W.3d at 812. Likewise, our review of the entire record does not show that the outcome of the proceeding would have been different had the records not been admitted into evidence. Because Lucien has not met the second prong of *Strickland*, we overrule Lucien's sole issue.

Conclusion

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY

Chief Justice

Before Chief Justice Gray,

Justice Davis, and

Justice Neill

Affirmed

Opinion delivered and filed March 11, 2020

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[CRPM]