IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-82,509-03

EX PARTE JAIME COVARRUBIAS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. W99-32080-V(C) IN THE 292ND DISTRICT COURT FROM DALLAS COUNTY

OPINION

KELLER, P.J., delivered the opinion of the Court in which HERVEY, RICHARDSON, YEARY, KEEL, SLAUGHTER and MCCLURE, JJ., joined. WALKER, J., dissented. NEWELL, J., did not participate.

In the year 2000, Applicant was convicted of capital murder and sentenced to life in prison for killing his one-time girlfriend, Erica Estrada, and her father, Enrique Estrada. He filed this habeas application in the trial court in 2019, alleging that trial and appellate counsel were ineffective for a number of reasons. The habeas court recommended that relief be granted,[1] but we conclude that none of Applicant's claims have merit.

A. General Factual and Legal Background

[1] In its second amended answer, the State agreed that trial counsel was ineffective for the four reasons later found by the habeas court.

1. The Killings

Erica Estrada had been living with Applicant, but she moved back in with her parents about a month before she was killed. On the day of the shootings, November 3, 1999, Applicant tried to see her. Rebuffed four times by her family members, he came back at night and got into the house through a window. Entering the living room while Erica's parents were watching television, Applicant jumped on Erica's father, threatened to kill him, struggled with him, and shot him. Erica's sister Diega called 911 as she fled to another room. Erica's mother Rosa grabbed her son and fled to the one of the bedrooms. After hearing Applicant "yelling to Erica that he was going to kill her," Rosa took her son outside to seek help. By this time, police had arrived in response to the 911 call. Rosa explained that her husband had been shot and that Applicant was searching for her daughters in the home. Police entered the house. An officer told Applicant to put the gun down and he started to do so, but then he swung the gun around and shot Erica. The officer shot Applicant at the same time. Applicant testified that he was trying to help Erica escape from an abusive family. He also claimed that he shot the father only after he lunged at Applicant with a knife, and he denied ever pointing his gun at Erica.

2. The Posture of the Case and the Law on Ineffective Assistance

Dates relating to trial and appeal have a bearing on some of the claims raised by Applicant. He was convicted of capital murder in August of 2000. The State did not seek the death penalty, so the trial court assessed an automatic life sentence. Appellate counsel filed his brief in July of 2001, and the court of appeals affirmed the conviction in April of 2002.[2]

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[2] *See Covarrubias v. State*, No. 05-00-01387-CR, 2002 WL 485365 (Tex. App.—Dallas April 2, 2002) (not designated for publication).

Under *Strickland v. Washington*, a person claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense.[3] There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and any finding of deficient performance must be firmly founded in the record.[4] In assessing an attorney's performance, every effort must be made to eliminate the distorting effects of hindsight.[5] An attorney cannot be held responsible for legal developments that occurred after his conduct. To show prejudice, an applicant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[6] Hindsight can eliminate prejudice, if what was once thought to be a meritorious claim is later determined to not have had merit after all.[7]

Trial counsel has died and is unable to respond to Applicant's allegations. We should be circumspect in our analysis of ineffective assistance claims in light of trial counsel's inability to respond, and we should keep in mind the strong presumption that counsel's performance was reasonable.[8] Appellate counsel has submitted an affidavit.

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[3] 466 U.S. 668, 687 (1984).

[4] *Johnson v. State*, 624 S.W.3d 579, 586 (Tex. Crim. App. 2021).

[5] *Strickland*, 466 U.S. at 690.

[6] *Id.* at 694.

[7] *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (Precedent that supported granting relief had been overruled as wrongly decided; denying relief simply denied the defendant a windfall to which he was not entitled.).

[8] *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Absent an opportunity for counsel to respond to allegations of ineffective assistance, a court "should not find deficient performance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'");

B. Failure to Complain About Temporary Exclusion of Letters

The trial court initially excluded letters written by Erica but later reversed itself and admitted them. The habeas court faulted appellate counsel for failing to complain about the late admission of those letters. But a complaint about the lateness of the letters was not preserved, and even if it had been, trial counsel was able to use the letters before the jury, so Applicant has not been harmed.

1. Trial and Appellate Proceedings

During trial, defense counsel showed Rosa some letters from Erica that supposedly supported Applicant's belief that he needed to rescue her. When Applicant offered these letters at trial, the prosecutor objected that they were not signed and contained hearsay. The trial court sustained the objection, but admitted the letters for record purposes only. When trial counsel later tried to question Applicant about the letters, the trial court admonished, "I don't want any mention of those letters again until they're admitted into evidence, particularly the contents, because I've already sustained an objection as to the contents of the letters."

The trial court did, however, permit trial counsel to ask Applicant some further questions about the letters, without getting into what they said:

> Q. Were the letters a reason – one of the reasons why you went to her house on November 3rd, 1999?
>
> A. That's right.
>
> Q. Did those letters create your state of mind as to what you thought might be happening to Erica Estrada –
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> [PROSECUTOR]: I'm going to object to leading and violating the order you just

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Jones v. State, 296 Ga. 561, 564 (2015) ("Even where, as here, trial counsel is no longer available to testify regarding the manner in which he conducted appellant's defense at trial, appellant must still overcome this presumption.").

gave him, Your Honor.

THE COURT: Overruled.

Q. Did those letters create your state of mind as to why you needed to see Erica Estrada on November 3, 1999.

A. Very much.

Trial counsel then asked that the letters be admitted to show Applicant's state of mind. The trial court denied the request. Later, trial counsel again asked Applicant about the letters, with no objection from the State:

Q. Based on the conversations you had with her leading up to November 3rd on the phone and the letters that you sent her [sic?], did you feel like she wanted to see you?

A. Yes.

After the close of the evidence, trial counsel asked to reopen and re-offer the letters. The prosecutor continued to object on hearsay and relevance grounds. The trial court overruled the objection and admitted the letters for all purposes. Trial counsel asked for and received permission to summarize portions of the letters for the jury. Trial counsel then spent some time reading from the letters before the jury (taking up 3 ½ pages in the record). Closing arguments were made immediately afterwards.

In his closing argument, trial counsel emphasized the letters, saying, "And up until about five minutes ago, when those letters were introduced into evidence, the State of Texas had a very neat tidy little case for you, all done up with a bow." Pointing to the prosecutor's prior objections, trial counsel argued that the State did not want the jury to see the letters and that Rosa had been reluctant to acknowledge them as being in Erica's handwriting. And he discussed the content of the letters.

Appellate counsel did not raise a complaint about the trial court's initial exclusion of the

letters. In his affidavit, appellate counsel said he that he likely did not believe the claim was preserved for review because trial counsel did not object at trial asserting that Applicant was prejudiced by the late admission of the letters and did not seek to recall Applicant to the witness stand to further testify about the letters. Appellate counsel also stated that nothing in the record indicated why trial counsel did not object and that trial counsel might have believed that reading the letters shortly before deliberations was sufficient, if not advantageous.

2. Habeas Court's Findings

The habeas court concluded that appellate counsel rendered ineffective assistance of counsel "by failing to argue the trial court erred in not permitting trial counsel to introduce letters written by the victims in time to allow the defense to properly use the evidence."[9] The habeas court noted, and did not dispute, appellate counsel's contention that the issue had not been preserved for review.[10] The habeas court found that, but for counsel's failure, there is a reasonable probability that the results of the proceeding would have been different.

3. Analysis

Appellate counsel took the position that error was not preserved. It is axiomatic that an adverse ruling is necessary to preserve error.[11] Because the trial court ultimately admitted the letters, there was no longer an adverse ruling with respect to trial counsel's initial request to admit them.

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[9] *Ex parte Covarrubias*, Findings of Fact and Conclusions of Law and Recommendation Granting Application for Writ of Habeas Corpus, paragraph 121 (January 7, 2022). Paragraphs are numbered sequentially as they appear in the order, with subheadings that characterize some of these paragraphs as "findings of fact" and others as "conclusions of law."

[10] *Id.*, paragraph 122.

[11] *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008).

Trial counsel did not complain about the lateness of the letters' admission and so did not obtain an adverse ruling with respect to that. Trial counsel also did not seek to put Applicant back on the stand to further testify about the content of the letters. Appellate counsel was entirely correct in his assessment that error was not preserved.

Moreover, any error in admitting the letters late appears to be harmless. Despite its earlier admonishment to not talk about the letters, the trial court did allow trial counsel to ask whether the letters affected Applicant's state of mind and made him think that Erica wanted to see him. And once the letters were admitted, trial counsel was able to read the parts he wanted to the jury, immediately before closing argument. The letters then became a substantial focus of trial counsel's closing argument. On this record, it appears that counsel was able to effectively use the letters despite their late admission. In fact, it is arguable that Applicant benefitted from the late introduction of the letters because they were the last evidence the jury heard before closing arguments and jury deliberations and because their late introduction kept the State from being able to cross-examine Applicant about them. Appellate counsel did not perform deficiently in failing to complain about an error that was not preserved and was harmless.

C. Failure to Complain about the Denial of Defensive Instructions

The habeas court found appellate counsel ineffective for failing to raise a complaint about the trial court's refusal of jury instructions, requested by the defense, on involuntary conduct at the guilt phase and sudden passion at the punishment phase. These claims lack merit.

1. Trial and Appellate Proceedings

When asked at trial what happened during his interactions with Erica after he entered the house, Applicant testified, "I remember putting the gun down and I heard shots and I heard

stomping." Applicant later testified as follows:

Q. Do you remember when shots were fired where you were standing?

A. No, I can't say that I do.

Q. Do you remember where Erica was standing?

A. No, I can't say that I do.

Q. Did you ever point that pistol, as the police officer described, at Erica like that?

A. No.

Q. Did you ever intend to kill her?

A. No.

Q. What was going through your mind when all this was happening?

A. I can't say that I know.

Q. Why is that?

A. I don't know, just confused. Just say confused.

* * *

Q. And in addition to that, that gun was in contact with her blouse when the trigger was pulled. You know that?

A. I can't say that I know.

Q. You don't remember doing that, do you?

A. No.

During cross-examination, the prosecutor questioned Applicant about shooting Erica, and Applicant responded, "Oh so I shot her? So you say I shot her. I admit I slapped her but I can't say that I shot her." The prosecutor asked, "Well, who do you think shot her then?" Applicant responded, "Well, I don't know. I can't answer that question."

Trial counsel submitted a proposed jury charge that included the following application-paragraph instruction on voluntary conduct:

> You are instructed that a person commits an offense only if he voluntarily engages in conduct, including an act, omission, or possession. Conduct is not rendered involuntary merely because the person did not intend the results of his conduct. Therefore, if you believe from the evidence beyond a reasonable doubt that on the occasion in question the defendant, Jaime Covarrubias, did cause the death of Erica Estrada, by shooting her with a gun, as alleged in the indictment, but you further believe from the evidence, or you have a reasonable doubt thereof, that the shooting was not the result of voluntary act of the defendant then you will acquit the defendant and say you [sic] verdict "Not Guilty" of the murder of Erica Estrada and next consider the lesser included offense of manslaughter.[12]

Trial counsel asked for a "voluntary manslaughter" instruction at the guilt stage of trial. He took the position that the then-current statutory law in Texas was unconstitutional:

> [T]he law as it now stands regarding voluntary manslaughter violates this defendant's Constitutional rights . . . in that the statute now makes voluntary manslaughter a punishment issue, which means in a capital murder case he is precluded from offering that to a jury since there would be no punishment phase; he would be sentenced to an automatic life in prison.

Because Applicant was convicted of capital murder, there was no punishment stage of trial. The trial court did ask trial counsel if there was "any legal reason under law why your client should not be sentenced at this time?" Trial counsel responded, "No legal reason at this time." Trial counsel did not request a "sudden passion" punishment instruction or ask that the trial court consider or make a finding on "sudden passion."

Appellate counsel did not complain about the trial court's failure to submit these instructions. Appellate counsel was called upon to respond to the following claim relating to these instructions:

Appellate counsel was ineffective because he failed to argue that the trial court erred

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[12] By its wording, the requested instruction appears to relate only to the lesser-included offense of murder.

> in denying trial counsel's requests for instructions on involuntary conduct at the guilt/innocence phase and sudden passion at the punishment phase.

Appellate counsel said he likely did not raise a claim regarding involuntary conduct because he believed that the trial record did not contain any evidence to support such a claim. Specifically, he took the position that Applicant's testimony that he did not remember shooting Erica did not raise the issue of involuntary conduct. With respect to sudden passion, appellate counsel said he likely did not raise a claim on direct appeal as to that issue because there was no punishment stage of trial.

2. Habeas Court's Findings

The habeas court pointed out that the application section of the jury charge proposed by the defense included a voluntary conduct instruction on the death of Erica.[13] The court found appellate counsel ineffective because he did not raise the issue of the trial court's error in denying trial counsel's requests for additional jury instructions.[14]

3. Analysis

Applicant could not have been entitled to a sudden-passion instruction at the punishment stage of trial because there was no punishment stage in his trial, assessment of a life sentence being automatic when a defendant is found guilty of capital murder and the State does not seek the death penalty.

A review of Applicant's original habeas application suggests that he was actually talking about counsel's request for an involuntary-manslaughter instruction. Appellate counsel, however, was told to respond to a claim about a sudden-passion issue at punishment, and he has not been

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[13] *Id.*, paragraph 46.

[14] *Id.*, paragraphs 56, 73.

given an opportunity to respond to a claim about the failure to give a voluntary manslaughter instruction at guilt.

Regardless, the voluntary-manslaughter claim is meritless. Trial counsel conceded at trial that the statute made sudden passion a punishment issue,[15] preventing that issue from ever coming into play if a defendant is convicted of capital murder. Before Applicant's brief on appeal was filed, the issue was settled by this Court. We held that the new statutory scheme was constitutional and that a capital-murder defendant was not entitled to the litigate the issue of sudden passion at the guilt stage of trial.[16] We have since reaffirmed that determination.[17]

As for the requested instruction on involuntary conduct, appellate counsel is correct: the evidence did not raise it. The voluntariness of conduct under the Texas statute refers only to "one's own physical body movements."[18] No evidence suggested that Erica was shot as a "nonvolitional result of someone else's act" or "some independent non-human force" or "as a result of a physical reflex or convulsion," or as "the product of unconsciousness, hypnosis or other nonvolitional impetus."[19] Applicant testified that he did not remember shooting Erica. We agree with one court of appeals's observation that a defendant's testimony about lack of memory does not, by itself, raise

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[15] *See* TEX. PENAL CODE § 19.02(a), (d).

[16] *Wesbrook v. State*, 29 S.W.3d 103, 112-13 (Tex. Crim. App. 2000) (plurality op.).

[17] *Mays v. State*, 318 S.W.3d 368, 387-88 (Tex. Crim. App. 2010).

[18] *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003). *See also Adanandus v. State*, 866 S.W.2d 210, 229-30 (Tex. Crim. App. 1993).

[19] *See Rogers*, *supra.*

the issue of involuntary conduct.[20]

The upshot of this discussion is that appellate complaints about the two requested instructions at issue before us—on voluntary manslaughter and involuntary acts—would have lacked merit. Appellate counsel cannot be ineffective for failing to raise meritless claims.

D. Supplemental Jury Instruction

The habeas court found both trial and appellate counsel to be ineffective for failing to complain about a supplemental jury instruction. Because the law at the time supported giving the supplemental instruction, neither attorney performed deficiently for failing to complain about it. Even if they had been deficient under the law at the time, Applicant has suffered no prejudice because we have since clarified the law, and our clarification supports the trial court's supplemental instruction.

1. Trial and Appellate Proceedings

The theory of capital murder in the indictment was the murder of more than one person in the same transaction,[21] for killing Enrique and Erica Estrada. The guilt-stage jury charge included instructions on the charged offense of capital murder and the lesser-included offense of murder. A transitional instruction between the two offenses required the jury to acquit on the charged offense before considering the lesser-included offense:

> Unless you find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider the lesser-included offense of murder.

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[20] *See Peavey v. State*, 248 S.W.3d 455, 465 (Tex. App.—Austin 2008, pet. ref'd) (discussing the defense of "automatism" and citing 2 Wayne R. LaFave, Substantive Criminal Law § 9.4(b) at 35.).

[21] *See* TEX. PENAL CODE § 19.03(a)(7)(A).

The jury was then instructed on the lesser-included offense as follows:

> If you find from the evidence beyond a reasonable doubt that on or about November 3rd, 1999, in Dallas County, Texas, the defendant, Jaime Covarrubias, did intentionally or knowingly cause the death of Enrique Estrada by unlawfully shooting him with a deadly weapon, namely a firearm, but you have a reasonable doubt as to whether the defendant did knowingly or intentionally cause the death of another individual during the same criminal transaction at the time of the shooting, if any, then you will find the defendant guilty of murder, but not capital murder.

The jury charge also instructed the jury to certify its verdict using the appropriate form "when you have unanimously agreed upon a verdict."

During the guilt-stage deliberations, the jury sent out numerous notes. Several of the notes are potentially relevant to the issue here. In one of these notes, the presiding juror stated:

> We are not in agreement on knowingly and intentionally killing Erica Estrada. At this point, I can see no unanimous decision in any time soon.

The trial court responded, "Please continue with your deliberations." In a later note, the jury asked:

> Can we find the defendant guilty of a "lesser charge than capital murder" in the death of Enrique Estrada and Erica Estrada? If we find him (defendant) guilty of murder against Enrique Estrada, does this nullify the charges against the defendant for the death of Erica Estrada?

The trial court responded:

> In response to your first question, please reread the court's charge, particularly page 4. In response to your second question, please refer to page 8 of the Court's charge where your options are guilty of capital murder, guilty of murder or not guilty. Please continue with your deliberations.

In a later note, the jury asked:

> If we can not agree on the charge of capitol murder . . . can we find the defendant "guilty of murder" in both offenses ie the death of Enrique Estrada & Erica Estrada?[22]

The trial court responded, "Please reread the Court's charge, particularly page 4. Please continue

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[22] Ellipsis in original. *Sic et passim.*

with your deliberations." In a later note, the jury asked:

> In the instruction, are we clear, if we cannot unanimously come to guilty on capital murder, are we ordered to go to second charge of murder?

The trial court responded with the following supplemental instruction:

> You must first consider the charge of capital murder, and reach a unanimous decision of guilty or not guilty. Only if there is a unanimous finding of not guilty should you next proceed to consider the lesser-included offense of murder. Please refer to page 4 of the Court's charge and continue your deliberations.

Trial counsel did not object to this supplemental instruction. In its next note, the jury stated, "We are completely deadlocked. Please advise. Thank you." The trial court responded, "Please continue with your deliberations." The jury ultimately found Applicant guilty of capital murder.

Appellate counsel did not complain about the supplemental instruction on appeal. In his affidavit, appellate counsel explained why he likely did not do so:

> I likely did not raise this issue on direct appeal because there was no defense objection to the instruction at trial, and therefore I likely believed that no complaint as to the instruction was preserved for appellate review on direct appeal. It is also likely that I did not believe that without such an objection, the trial court's instruction constituted error so egregious that no trial objection was needed for appellate review.

2. Habeas Court's Findings

In one of its findings of fact, the habeas court said, "The trial court erroneously instructed the jury that it must unanimously acquit Applicant of capital murder before considering the lesser-included offense of murder."[23]

In its conclusions of law, the habeas court determined that trial counsel was ineffective for

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[23] Findings, paragraph 53.

failing to object to the supplemental jury instruction.[24] The court relied partly on *Barrios v. State*[25] for this conclusion.[26] The court found prejudice because of the jury's repeated expressions of deadlock or confusion regarding the capital murder charge and lesser-included offenses.[27] The habeas court found a reasonable probability that, absent the supplemental instruction, the jury would have considered and ultimately convicted on a lesser-included offense.[28]

The habeas court determined that appellate counsel was ineffective for failing to complain about the supplemental instruction on appeal.[29] The court rejected lack of preservation as a reason not to raise the issue on appeal because it believed that the jury charge error at issue was reversible under the "egregious harm" standard.[30]

3. Analysis

The habeas court's finding that the supplemental instruction was erroneous did not account for the law at the time of trial.

An instruction that guides the jury on when and how to consider a lesser-included offense is sometimes known as a "transitional instruction." At the time Applicant's case was tried, the most recent case from this Court on the subject was *Boyett v. State*, which explicitly stated that a

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[24] *Id.*, paragraph 57.

[25] 283 S.W.3d 348 (Tex. Crim. App. 2009).

[26] Findings, paragraph 58.

[27] *Id.*, paragraph 60.

[28] *Id.*

[29] *Id.*, paragraph 67.

[30] *Id.*, paragraphs 69, 70.

transitional instruction should require a jury to acquit first of the charged offense before considering a lesser-included offense.[31] This is known as an "acquittal first" instruction.[32] The transitional instruction originally included in Applicant's jury charge complied with *Boyett*.

The *Boyett* instruction does not explicitly talk about unanimity, but because a jury verdict must be unanimous, an instruction to the jury to "acquit" of the charged offense before considering the lesser-included offense is functionally an instruction to arrive at a unanimous verdict on the charged offense before considering the lesser-included offense.[33] When the jury in this case expressed confusion about whether unanimity was required, the trial court clarified the matter with an explicit supplemental instruction. That unanimity instruction was entirely consistent with the "acquittal first" approach in *Boyett*.

In *Barrios*, the Court suggested in *dictum* that giving an "unable to agree" instruction "may"

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[31] *See* 692 S.W.2d 512, 516 (Tex. Crim. App. 1985) (Jury charge should "explicitly instruct[] the jurors that if they did not believe, or if they had reasonable doubt of appellant's guilt of the greater offense, they should acquit [the defendant] and proceed to consider whether [he] was guilty of the lesser included offense.").

[32] At least one earlier case might place Texas in the "modified acquittal first" camp. *See Childress v. State*, 55 Tex. Crim. 186, 188 (1909) ("We are of opinion that the charge as given is sufficient, wherein the court instructed the jury, that if appellant committed an unlawful assault, and there was a reasonable doubt as to whether it was an assault to murder or aggravated assault, they should acquit of assault to murder and convict of an aggravated assault.").

[33] Even a "modified acquittal first" approach would require a unanimous acquittal of the greater offense before rendering a verdict on a lesser-included offense. *Lewis*, 433 P.3d 276, 287 (N.M. 2018) ("[W]e are concerned that under an unable to agree instruction the jury may convict a defendant of a lesser offense without unanimously acquitting him or her of the greater offense, thereby barring retrial of an offense on which the defendant has not actually been found not guilty. . . . Due to these concerns, we are persuaded that the modified acquit first approach . . . is the most sound approach.")

be "a better practice."[34] But *Barrios* was handed down in 2009; it did not exist when Applicant was tried in 2000 or when the case was decided on appeal in 2002. Trial and appellate counsel cannot be held responsible for a case that did not exist, when the relevant caselaw at the time supported what the trial judge did. Given *Boyett* and the Texas statute, trial and appellate counsel did not perform deficiently in failing to complain about the supplemental instruction.

Moreover, in *Sandoval v. State*, we recently held that "a jury must be required to agree on an acquittal of the greater offense before it can return a conviction on a lesser-included offense."[35] Even if *Barrios* had existed at the time of trial, the holding in *Sandoval* means that Applicant cannot claim harm from the possibility that the jury would not have arrived at a unanimous verdict on the charged offense.

E. Appellant's Absence During Jury-Note Proceedings

The habeas court found trial counsel to be ineffective for failing to secure Applicant's presence in the courtroom while jury notes were being received and responses discussed. Applicant has not shown prejudice because his presence was not required to address the purely legal issues posed in the jury notes, nor is there any reason to think his presence would have changed the trial court's responses.

1. Trial

The jury sent out a number of notes during the guilt-stage deliberations. Some of those notes are detailed earlier, and there were others from the jurors that indicated that they could not reach a

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[34] 283 S.W.3d at 353.

[35] *Sandoval v. State*, No. AP-77,081, ___ S.W.3d ____, ____, 2022 Tex. Crim. App. LEXIS 844, *76 (Tex. Crim. App. December 7, 2022).

unanimous verdict on capital murder. Applicant was not present when the trial court received and acted on the jury notes, although his attorney was.

2. Habeas Court's Findings

The habeas court concluded that trial counsel was ineffective for failing to secure Applicant's presence in the courtroom when the jury notes were received and responses discussed.[36] The habeas court pointed both to the defendant's general constitutional right to be present and to a statute requiring the trial court to use diligence in securing the presence of the defendant and his counsel before answering a jury note.[37] The habeas court concluded that there could be no reasonable strategy for failing to secure Applicant's presence.[38] The court concluded that Applicant was prejudiced because he was deprived of the opportunity to assist in his defense.[39]

3. Analysis

When a defendant "is not actually confronting witnesses or evidence," the right to be present is protected by the Due Process Clause of the Fourteenth Amendment.[40] This right to presence is not absolute; rather, the "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."[41] This occurs only when the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to

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[36] Findings, paragraph 62.

[37] *Id.*, paragraphs 63, 64. *See* TEX. CODE CRIM. PROC. art. 36.27.

[38] Findings, paragraph 65.

[39] *Id.*

[40] *United States v. Gagnon*, 470 U.S. 522, 526 (1985).

[41] *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934).

defend against the charge.[42] We have suggested that the "reasonably substantial relationship" test is also part of a harm analysis for the violation of a statute that requires the defendant's presence.[43] Although a different statute was at issue in that prior case, the underlying concerns appear to be the same here. And when the defendant's absence occurs during jury deliberations, the different harm inquiries seem to coincide—whether there is a reasonable probability that the outcome would have been different under *Strickland* and whether the defendant's presence had a reasonably substantial relationship to his opportunity to defend are, at this late stage of the trial, essentially the same inquiry.

It is not apparent how Applicant's presence would bear a reasonably substantial relationship to the opportunity to defend. In addressing the jury's unanimity and deadlock issues, the trial court and the parties were faced with purely legal questions, and as discussed above, the law at the time supported the supplemental instruction. Nor is it apparent how Applicant's presence could have assisted trial counsel or the court in responding to the various notes sent by the jurors. Applicant has not shown prejudice.

F. Allegedly Biased Juror

The habeas court found both trial and appellate counsel ineffective for failing to complain about a biased juror. Even if trial counsel was deficient for failing to challenge the juror, Applicant has not shown prejudice because the record does not establish that the juror was actually biased. The reason the record does not show bias is that the juror was never asked if he could follow the law regardless of his personal views.

For this reason, Applicant also has not shown deficient performance or prejudice with respect

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[42] *Id.* at 105-06.

[43] *Adanandus v. State*, 866 S.W.2d 210, 219-20 (Tex. Crim. App. 1993).

to appellate counsel because the record does not show reversible error. In addition, Applicant has not shown that appellate counsel was deficient because error on a challenge-for-cause claim was not preserved and because appellate counsel cannot be blamed for failing to raise an ineffective-assistance-of-trial-counsel claim when trial counsel had not been given an opportunity to respond to such a claim.

1. Trial and Appellate Proceedings

William Kothe was a prospective juror who ultimately served on the jury. At one point during voir dire, Kothe asked, "Is it possible we know the ages of the victims?" Later in voir dire, Kothe said, "I love kids, and this has to do with children, which I don't know if it does or not, but if it has to do with children I know I couldn't be impartial, no way." Later, trial counsel talked about lesser-included offenses, which led to this colloquy:

> [TRIAL COUNSEL]: I'm going to make it even a little more difficult. That charge is going to tell you if you have a reasonable doubt as to whether it's capital murder or murder, or a lesser included, that that doubt always, always must be resolved in the defendant's favor and you must go with the lesser included offense. And that sticks in some people's craw. They say, wait a minute. I'm pretty sure it's capital murder but I'm not sure beyond all reasonable doubt. I don't know whether it's capital murder or murder. The law says you have to go with the lesser. How do you feel about that, Ms. Warren?
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> PROSPECTIVE JUROR WARREN: I have to digest that a while.
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> [TRIAL COUNSEL]: Go ahead and think about it and I'll come back. I've already got you for an issue that we need to talk to you about so when we bring you up we'll discuss that again. There were some other hands at the same time as Ms. Warren. Mr. Joyce?
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> PROSPECTIVE JUROR JOYCE: I have a problem with that.
>
> [TRIAL COUNSEL]: I've got you for those issues also, so I'm going to go ahead and write that down also. Appreciate it. Anybody else on the first row? Anybody on the second row that has a problem with lesser included offenses? Anybody -- Ms.

> Dannenbring? All right, I'll note that also. I appreciate it. Anybody on the third row, Mr. Cooper's row? Mr. Sonntag. Let's see if I can find you on my list. All right, we've already got you. I'll write that down, Mr. Sonntag. Do not let me forget that. Anybody else on Mr. Sonntag's row? Mr. Kothe we've got you for another issue.

For at least two prospective jurors—Sonntag and Fogarty—there were doctor appointments that could potentially conflict with the trial.

Later, trial counsel discussed the prospective jurors that he wished to challenge for cause. This discussion included the following:

> [TRIAL COUNSEL]: If we go back to 44 or 45, Sonntag and Fogarty, they both said they couldn't resolve lessers in favor of the defendant.
>
> THE COURT: I don't recall Fogarty saying that.
>
> * * *
>
> [PROSECUTOR]: I know Sonntag said he had to take his wife to the eye doctor tomorrow and Fogarty has a doctor's appointment for her daughter.
>
> * * *
>
> [DEFENSE COUNSEL]: That's right. That's why I circled her name. Do you want to come back to both of them?
>
> THE COURT: Well, I can tell you, he's going to have to change his eye doctor's appointment or his wife's.
>
> * * *
>
> [TRIAL COUNSEL]: Judge, if we could go back to number 45, Mr. Sonntag. Or 44, I'm sorry. I would submit him for cause. He said he could not resolve any lesser includeds if he had a reasonable doubt in favor of the defendant. I would submit juror number 44.
>
> [PROSECUTOR]: I would agree to him.
>
> THE COURT: 44 is gone by agreement for cause.

The parties also discussed excusing Forgarty on the basis of her potentially conflicting doctor appointment. The trial court ultimately left the decision up to the parties but indicated that it would

only strike one more juror by agreement—either juror 5 or 45. Fogarty was juror 45. The prosecutor said he would agree to juror 5, and defense counsel said, "All right." The trial court excused juror 5 by agreement for cause. The prosecutor later exercised a peremptory challenge against Fogerty.

Trial counsel did not challenge Prospective Juror Kothe for cause. Appellate counsel said he did not complain on appeal about the trial court's failure to excuse Kothe because error had not been preserved at trial. He further explained that he did not raise an ineffective assistance claim regarding trial counsel's failure to make a challenge because he could not determine from the record whether trial counsel's failure to challenge the juror was purposeful and the result of trial strategy.

2. Habeas Court's Findings

The habeas court made the following findings of fact:

> 81. The record is clear that Mr. Kothe, like Mr. Sontag, indicated that he could not follow the law with regard to lesser-included offenses.
>
> 82. Mr. Sontag was struck, by agreement, for his inability to follow the law regarding lesser-included offenses.
>
> 83. Prospective juror Fogarty, who sat on Mr. Kothe's row, did not indicate an ability [sic?] to follow the law.
>
> 84. Trial counsel failed to follow up with Mr. Kothe regarding the issue of lesser included offenses instead indicating to Mr. Kothe, during questioning, that he had him "for another issue."
>
> 85. Yet, trial counsel failed to challenge Mr. Kothe for cause or exercise a p[er]emptory strike against Mr. Kothe and, as a result, he ended up serving on the jury as the presiding juror.[44]

In its conclusions of law, the habeas court found that "Kothe indicated an inability to set aside his bias regarding the applicable law on lesser-included offenses and, as such, should have been

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[44] Findings, paragraphs 81-85.

struck for cause."[45] The habeas court also concluded that there was no plausible professional reason for failing to challenge Kothe for cause, or to at least exercise a peremptory strike on him or ask for an additional peremptory strike.[46] The habeas court further concluded that Sonntag was excused by agreement "for the exact same reason."[47] The habeas court also concluded that trial counsel had simply been mistaken about which prospective juror had given the same answer as Sonntag—confusing Prospective Juror Fogarty, who was not challengeable, with Kothe.[48] The habeas court further found that trial counsel's failure to challenge Kothe was not the result of a reasonable professional trial strategy, especially given trial counsel's statement that he had Kothe down for a different issue, likely the statement about not being impartial for an offense involving children.[49] In a footnote, the habeas court said that Erica was18 years old.

The habeas court further concluded Applicant was harmed because Kothe ended up as the foreman of the jury, the lesser-included offense was central to the case, and jury notes indicated that the jury was deadlocked at some point.[50]

The habeas court also found appellate counsel to be ineffective for not raising a biased juror

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[45] *Id.*, paragraph 91.

[46] *Id.*, paragraph 92.

[47] *Id.*, paragraph 93.

[48] *Id.* This finding is not supported by the record. Although trial counsel initially said that Fogarty could not follow the law on lesser-included offenses, the prosecutor's comment about Fogarty's doctor appointment made trial counsel realize that he was mistaken about that.

[49] *Id.*, paragraph 94.

[50] *Id.*, paragraph 95.

complaint about Kothe on appeal.[51] The court concluded that appellate counsel could have shown fundamental error in failing to excuse Kothe.[52] The habeas court further concluded that appellate counsel could have raised an ineffective assistance complaint on appeal because the record showed that counsel mistook Fogarty for Kothe and thus had no trial strategy.[53]

3. Analysis

When a defendant claims on direct appeal that a challenge for cause was improperly denied, harm occurs when he is forced accept an objectionable juror that he could have otherwise struck with a peremptory challenge.[54] But some federal courts and the Supreme Court of Florida have held that the standard of prejudice is more onerous when a defense attorney's failure with respect to a juror at voir dire is part of an ineffective assistance claim.[55] These courts have held that prejudice is

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[51] *Id.*, paragraphs 98-99.

[52] *Id.*, paragraphs 100-01.

[53] *Id.*, paragraph 102.

[54] *See Daniel v. State*, 485 S.W.3d 24, 33 (Tex. Crim. App. 2016) ("To establish harm for an erroneous denial of a challenge for cause, the defendant must show on the record that: (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury.").

[55] *Treesh v. Bagley*, 612 F.3d 424, 437 (6th Cir. 2010) ("To show prejudice arising out of trial counsel's failure to challenge a juror, however, Treesh must show that the juror was biased against him.") (failure to challenge jurors for cause); *Fields v. Brown*, 503 F.3d 755, 776 (9th Cir. 2007) ("Prejudice exists if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Here there is no such reasonable probability, because Hilliard was not biased. The impartiality of the jury was not undermined by his being seated as a juror. Replacement of one unbiased juror with another unbiased juror should not alter the outcome.") (failure to question juror about attack on his wife) (citation omitted); *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995) ("Goeders' claim of ineffective assistance of counsel is grounded in the claim that counsel failed to strike a biased juror. To maintain a claim that a biased juror prejudiced him, however, Goeders must show that the juror was actually biased against him.");

established only when a biased juror—not merely an objectionable one—sat on the jury.[56] These courts have applied this biased-juror standard not only to a claim that a defense attorney should have raised a challenge for cause,[57] but also to a claim that he should have questioned a juror[58] or exercised a peremptory challenge.[59] When the issue is whether a juror should have been challenged for cause on the basis of bias, this more onerous harm standard amounts simply to a more specific application of the rule that a failure to object will not support a claim of ineffective assistance unless the trial judge would have erred in overruling the objection.[60] That is, if the juror was not in fact biased, then the trial court would not have erred in denying the challenge for cause on that basis.

But even when the issue revolves around defense counsel's failure to exercise a peremptory challenge, a requirement that bias be shown makes sense in the context of the *Strickland* prejudice requirement, at least when the claim is that a strike should have occurred because of the juror's views.

Mosley v. State, 209 So. 3d 1248, 1264-65 (Fla. 2016) ("The standard for obtaining a reversal upon the erroneous denial of a cause challenge is relatively lenient: a defendant need only show that an objectionable juror—whether or not actually biased—sat on the jury. Our consideration of postconviction claims, however, is more restrictive. . . . . In order to establish that the defendant suffered prejudice based on counsel's failure to strike a juror during voir dire, the defendant must demonstrate that an actually biased juror served on the jury."). *See also Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181, 1201 (11th Cir. 2012) (saying that there was arguably no prejudice because "if no juror were biased, then there is no 'reasonable probability that . . . the result of the proceeding would have been different.'").

[56] *See supra* at n.55.

[57] *See Treesh*, 612 F.3d at 435; *Goeders,* 59 F.3d at 74-75; *Mosley*, 209 So. 3d at 1265-66.

[58] *See Fields,* 503 F.3d at 776.

[59] *See Owen v. State*, 986 So. 2d 534, 549-50 (Fla. 2008).

[60] *See Prine v. State*, 537 S.W.3d 113, 117-18 (Tex. Crim. App. 2017) ("The failure to object will not support a claim of ineffective assistance unless the trial judge would have erred in overruling the objection.").

There is always the *possibility* that a juror's views will influence a trial. But if a juror has not been shown to be biased, then, however objectionable the juror might be to the defense because of the views expressed, one can cannot conclude that there is a *reasonable probability* that the outcome of the trial would have been different without that juror.[61] Accordingly, for Applicant to prevail on the claim that Kothe should have been challenged for cause or struck peremptorily on the basis of bias against the law, the record must show that Kothe was in fact biased.

The habeas court found that the record is clear that Kothe could not follow the law regarding lesser-included offenses, but that finding is not supported by the record. Before a prospective juror may be excused for cause on the basis of bias against the law, "the law must be explained to him *and* he must be asked whether he can follow that law regardless of his personal views."[62]

It is questionable whether the law was explained to the prospective juror. The venire was told, in the abstract, that a reasonable doubt as to whether capital murder or a lesser-included offense was committed required a verdict on the lesser-included offense. But the prospective jurors were not told the specifics of how that instruction would apply.

But even if the abstract statement of law counted as an explanation of the law, the jurors were never asked if they could follow the law regardless of their personal views. They were asked only if they had a "problem" with the law. They were not asked a follow-up question about whether they could follow the law regardless of any problems they had with it. And the fact is, we know hardly anything about Kothe's views. The question was directed at the venire in general, asking for a show of hands, and *at most*, simply asked vaguely about whether the prospective jurors had a "problem"

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[61] *See supra* at n.55.

[62] *Tracy v. State*, 597 S.W.3d 502, 512 (Tex. Crim. App. 2020) (emphasis added).

with the law.[63] No follow-up questioning occurred to explore what the problem might be for a particular person or the intensity of a person's feelings in that regard. That sort of follow-up questioning might have at least shed some light on a prospective juror's ability to set aside personal feelings about the law, though an explicit question would still be needed on whether the juror could follow the law regardless of his personal views.

The habeas court also pointed to Kothe's statement about not being impartial when children are the victims, though it did not explicitly find that this made Kothe challengeable for cause. But there were no child victims in this case. The habeas court stated that Erica was 18 when she was killed, but the trial testimony was that she was 19. Even under the habeas court's mistaken impression as to her age, however, Erica would have been an adult.

The habeas court concluded that Sonntag was excused for the exact same reason that made Kothe challengeable. This conclusion is not supported by the record. It is true that Kothe and Sonntag both raised their hands to the same question about lesser-included offenses, that defense counsel's challenge was on the basis he is now claiming against Kothe, and that the State agreed to excusing the juror. But all the record shows is that Sonntag was excused by agreement. The record does not show that the trial court believed Sonntag to be challengeable for cause, nor does it show that the prosecutor agreed with defense counsel's articulated reason for excusing the juror. It is possible that the prosecutor agreed to excuse Sonntag because of the conflicting doctor appointment and that he peremptorily struck Fogerty for the same reason.

But even if Applicant had shown that Sonntag was excused for the reason articulated by trial

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[63] If Kothe raised his hand because he agreed with the juror who had said she to "digest" what defense counsel was saying, then that would suggest mere confusion about rather than a problem with the law.

counsel and that Kothe would have been excused for that reason if he had been challenged, Applicant fails to demonstrate prejudice. Excusing Kothe by agreement on this record would have simply had the effect of giving Applicant an extra peremptory challenge. Because Applicant has failed to show bias, he has failed to establish prejudice under *Strickland*. The habeas court suggested that harm was shown because the jury was deadlocked for a while on whether Applicant was guilty of capital murder or a lesser-included offense. But because Kothe has not been shown to be biased, it has not been shown by a reasonable probability that the jury's verdict would have been different if another person had sat on the jury in Kothe's place.

The failure to show bias is also fatal to Applicant's claim against appellate counsel. Because Kothe has not been shown to have been biased, a challenge-for-cause complaint about the juror on appeal would have been meritless. And an ineffective-assistance-of-trial-counsel claim would have lacked merit on appeal for the same reason it is without merit in the current habeas proceedings. Appellate counsel is not deficient for failing to raise meritless claims on appeal, and Applicant has suffered no prejudice because he would not have prevailed on those claims.

Moreover, appellate counsel is correct that error was not preserved with regard to a freestanding complaint about the trial court's failure to excuse a juror. "All grounds for challenge for cause may be forfeited."[64] The habeas court errs to conclude that Applicant could have prevailed on a theory of fundamental error. And given our prior pronouncement that direct appeal will rarely

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[64] *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). *See also Grado v. State*, 445 S.W.3d 736, 740 (Tex. Crim. App. 2014) ("It is true that we have held that a challenge for cause to a juror's impaneling based on one of the reasons listed in Code of Criminal Procedure Article 35.16, is forfeited if not asserted at trial.").

provide sufficient information to evaluate an ineffective-assistance claim,[65] appellate counsel can hardly be blamed for failing to raise such a claim in Applicant's appeal, when trial counsel had not been given an opportunity to respond.[66]

G. Failure to Impeach or Contradict

The habeas court found trial counsel ineffective for failing to impeach or contradict January 24, 2023a witness's testimony with testimony or a prior statement from another witness. For the reasons discussed below, we disagree with the habeas court's findings of deficient performance and prejudice.

1. Pretrial Statements

This issue involves statements from Erica's mother and from Erica's sister. Erica's mother Rosa gave a statement to the police , in which she said that when Applicant came over on the evening of the murders, he sought to take Erica, and "I would not let her go out." Erica's sister Diega gave a statement to the police in which she said, "Erica then told me that she was going to tell [Applicant] that she didn't want to talk to him or see him anymore." Later in her statement, Diega said she heard her mother telling Erica not to leave and that Erica responded that she was just going to talk to Applicant and clear things up. Diega also said that her mother "was real worried and was afraid Erica would leave with [Applicant] and wouldn't let her out."

2. Trial

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[65] *See Thompson v. State*, 9 S.W.3d 808, 813014 (Tex. Crim. App. 1999).

[66] In later cases, we have expanded on that pronouncement in *Thompson* to say that "appeal is usually an inadequate vehicle for raising such a claim" and that counsel "should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *See Menefield v. State*, 363 S.W.3d 591, 592-93 (Tex. Crim. App. 2012).

Rosa testified at trial that Applicant wanted to take Erica out, but she did not want to leave with him. During cross-examination, Rosa acknowledged that she had made a statement to the police. She spoke to the police in Spanish, and what she said was translated into English in written form. She testified that she did not remember whether she had signed the written statement, but when it was shown to her, she acknowledged that her signature was on the second page. An interpreter translated the written statement to her in Spanish while she was on the witness stand. Trial counsel then asked, "Do you remember now giving a statement to the police?" Rosa responded, "November 3rd I gave them that information." Trial counsel then asked, "And the information that is on that — those two pieces of paper as translated to you is true and correct; is that correct?" Rosa responded, "It's not correct where it says that I didn't let her out."

Diega testified that Applicant was told four times that day that Erica did not want to see him anymore but that he would not listen and go away. She said that "everybody was afraid" that Applicant would take Erica "away from us, because she didn't want to go with him no more." Diega testified to seeing Applicant with a gun and to hearing a gunshot. While she was calling 911, she heard Erica saying, "Why are you doing this to me?" or "Why are you doing this to us?"

Diega also testified that she saw Erica with bruises on her "many times" while Erica was living with Applicant. She saw bruises on Erica's arms and legs, and one on her cheek. When Diega asked about the bruises, Erica would claim "they were hickies or she hit herself."

Trial counsel did not question Diega about her pretrial statements indicating that her mother would not let Erica out.

During his testimony, Applicant admitted that he used to slap Erica when she lived with him.

3. Habeas Court's Findings

The habeas court concluded that trial counsel rendered ineffective assistance by failing to contradict or impeach Rosa's testimony that "Erica did not want to leave with Applicant when he came to their home."[67] As support for the conclusion that this testimony could have been contradicted, the habeas court found that Diega told the police that "it was Rosa who prevented Erica from leaving with Applicant and that Erica, in fact, wanted to talk to Applicant."[68] The habeas court further concluded that trial counsel "failed to use available evidence to challenge Rosa's version of events" and "failed to even question Diega Estrada regarding Erica wanting to speak with Applicant and being kept inside by Rosa."[69] The habeas court concluded that the impeachment testimony was critical to Applicant's defense because of Applicant's testimony that he was worried about Erica's safety with her parents.[70]

4. Analysis

The habeas court reads too much into Diega's pretrial statements when it suggests that they contradict Rosa's testimony that "Erica did not want to leave with Applicant." Diega maintained in her pretrial statements that Erica said she only wanted to speak with Applicant to tell them their relationship was over.

When viewed in isolation, Diega's pretrial statement that Rosa "wouldn't let her out" and Rosa's trial testimony that "[i]t's not correct where it says that I didn't let her out" might seem contradictory. But viewed in the context of what happened the day Erica was killed and of the trial

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[67] Findings, paragraph 116.

[68] *Id.*

[69] Findings, paragraph 118.

[70] *Id.*, paragraphs 117, 119

proceedings, it is not at all clear that there was really a material contradiction. The statement that Rosa "would not let her out" is vague. What does it mean to say she would not let her out? That she physically restrained her? Stood in the way of her exit? Told her not to leave? Strongly encouraged her not to leave? If Rosa and Diega simply meant, when they talked to the police, that Rosa strongly encouraged Erica not to leave, but what Rosa saw in those words at trial was something more than that, then all of the statements, before and at trial, would be truthful. There was also the language barrier to account for, with Rosa speaking in Spanish, having the statement translated into English, and having it translated back into Spanish at trial.

If trial counsel had explored the possible inconsistency between Rosa's trial testimony and Diega's pretrial statements, Rosa and Diega might both have been able to clear it up. As it was, by saying that her written statement was "not correct where it says" she did not let Erica out, Rosa at least seemingly acknowledged that her written statement did in fact say that she did not let Erica out. Trial counsel might have reasonably decided that it would not be beneficial to give the State the opportunity to clear up the apparent inconsistency.

Moreover, if trial counsel had introduced testimony from Diega about Rosa's efforts to keep Erica from going out to meet Applicant, the State could have introduced testimony that reflects the balance of Diega's pretrial statements. Diega would have been able to testify that the reason Erica sought to go out was to tell Applicant that she did not want to see him anymore. Diega would also have been able to testify about her statement that her mother was worried and afraid at the time.

And it is possible that those statements would be the tip of the iceberg. Diega was not a friendly witness for the defense. She testified briefly about Erica being abused by Applicant and her family being afraid of Applicant. Had the defense used Diega's statement about her mother not

letting Erica out, the prosecutor might have questioned Diega about *why* her mother would act that way, and her answers to those questions might have conveyed specific information substantiating a rational basis for being afraid of Applicant. Trial counsel might have reasonably concluded that impeaching Rosa would open the door to more damaging evidence against Applicant. But even if counsel performed deficiently in failing to elicit testimony from Diega consistent with her pretrial statements, Applicant has not shown prejudice. Applicant suggested that Erica's family was abusing her and that he was trying to rescue her. But Rosa and Diega suggested that Applicant was stalking Erica and trying to pull her back into an abusive relationship with him while the family was trying to protect her. Even if the jury concluded that Rosa *had* kept Erica from leaving the house on the day she was killed, that would not necessarily make it more likely to believe Applicant's story. As explained above, a jury would not have to believe that Rosa was lying in her trial testimony because there are shades of meaning with regard to whether Rosa "would not let her out" and there was a language barrier to take into account.

And it would not be surprising that Erica's parents would strongly discourage Erica from getting back into an abusive relationship with Applicant, even to the point of discouraging any contact with him. The whole tenor of Diega's pretrial statement, along with her testimony at trial, was that Applicant was a danger to Erica and the family. As explained earlier, questioning Diega about her pretrial statement would have allowed the prosecutor to elicit the other information in her statement that suggested that Erica wanted to end the relationship with Applicant and that the family was afraid of Applicant. Applicant's admission that he used to slap Erica further substantiates a conclusion that he was at least a danger to Erica, who needed the family's intervention to protect her.

But most importantly, Applicant's actions that day—entering the house through a window,

without permission, and shooting and killing two of the occupants, including Erica—eviscerates any notion that he went there to protect her. And his testimony attempting to explain his actions did the opposite—giving the jury a flimsy lack-of-memory excuse. The events that day showed that Erica needed to be protected from Applicant, and if the family seemed overzealous in protecting her at the time, later events would show their fears to have been fully justified. Given the evidence, we conclude that there is not a reasonable probability that the outcome would have been different.

H. Conclusion

Although the habeas court found a number of instances of ineffective assistance of counsel, we disagree with the habeas court's findings and conclusions on those matters. We conclude that Applicant's claims are all without merit. Consequently, we deny relief.

Delivered: January 25, 2023

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