Opinion issued April 3, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00030-CR

EX PARTE JUAN CARLOS ACEVEDO, Appellant

On Appeal from the County Criminal Court at Law No. 9
Harris County, Texas
Trial Court Case No. 2109205

MEMORANDUM OPINION

Appellant, Juan Carlos Acevedo, challenges the trial court's order denying his application for a writ of habeas corpus.[1] In three issues, appellant contends that the trial court erred in denying his requested relief, which he seeks on the grounds that he is actually innocent of the underlying misdemeanor offense of assault of a

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[1] *See* TEX. CODE CRIM. PROC. ANN. art. 11.09 (Vernon 2015); *see id.* art. 11.072 (Vernon 2015).

family member,[2] he entered his guilty plea involuntarily, and his trial counsel rendered ineffective assistance.

We affirm.

Background

On October 22, 1999, appellant, with an agreed punishment recommendation from the State, pleaded guilty to the misdemeanor offense of assault of a family member. The trial court accepted the plea agreement, assessed his punishment at confinement for one year and a $300 fine, suspended his sentence, and placed him on community supervision for two years. He discharged his sentence on October 17, 2001.

In August 2016, appellant filed his application for a writ of habeas corpus and later filed his first amended application.[3] In his amended application, he argues that he entered his guilty plea involuntarily and unknowingly because "he was not aware that he was waiving constitutional rights or establishing grounds for being barred from immigration possibilities when he signed the English language documents that he did not understand." Appellant further argues that his trial counsel rendered ineffective assistance because counsel failed to (1) investigate and research his case, including not interviewing witnesses and hiring experts;

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2 *See* TEX. PENAL CODE ANN. § 22.01(a), (b) (Vernon Supp. 2017).

3 *See* TEX. CODE CRIM. PROC. ANN. art. 11.09.

(2) advise him of the immigration consequences of his plea; and (3) adequately explain to him the legal consequences "included in [his plea] documents," or "what the legal terminology meant so that [he] could make an informed and intelligent plea," as he "did not understand the English language." He asserts that he is innocent, noting that the complainant in the underlying offense has provided an affidavit establishing that he did not "assault and cause bodily injury" to her and "her injuries were the result of an accidental fall." And appellant argues that "there [is] a collateral legal consequence/harm" resulting from his conviction because "he is not legally allowed in the United States and is subject to deportation proceedings."

The trial court held a hearing at which appellant's trial counsel, David Breston, the complainant, and appellant testified. Appellant testified that he and the complainant were married in 1997, he did not recall the date that they divorced, and they are not currently married. Spanish is his first language, and, in 1999, he did not speak or "officially read" English.

In regard to the underlying offense, appellant explained that, one day in August 1999, he went to the complainant's "place of employment" and found her "in a truck" with Gabriel Herrera, which "made [him] pretty angry." When asked if he remembered that the complainant ran into her workplace "when she was able to get up," appellant answered, "Yes, she went into her employment place." He

followed her because he "wanted to talk to her," but "she was hiding from [him]." Appellant "did not call 911 that day," left the scene before law enforcement officers arrived, and "just left [the scene] because [he] was taking care of [his] children." When asked if he "drug [the complainant] out of the truck" because he was angry, appellant answered, "No." And when asked, "[O]nce she was out of the truck, when you were dragging [her] she fell as you drug her and she hit her knee and elbow," appellant answered, "No, that did not happen." Appellant did not remember whether anyone had called for emergency assistance.

In regard to the trial court proceedings, appellant explained that he "got out on bond," but he did not remember whether he had hired his trial counsel or the court appointed counsel to represent him. He met trial counsel on "[t]he court date," which was not the day that he pleaded guilty, but "the first day of court." He saw trial counsel "in court" "[a]nother time, and then it was the decision." According to appellant, he did not meet "in person" with trial counsel before entering his guilty plea, but they did speak "[b]y telephone," meeting only "in court." When asked about the "seven court dates" between the first court date when he met trial counsel and the date that he pleaded guilty, appellant answered that he did not remember, but "[w]e might have [had] court and I didn't present myself or he presented himself." Appellant explained that on the day he pleaded guilty, "we were in the court and [counsel] made a sign and he took me out . . . and he told me, 'this is what

you have' and that's at this time and he came back in." Counsel spoke to appellant in English for "5 minutes," "told [him] about the case and what the Court had to offer," and "told [him] the charges that [he] had, and that's all." Appellant noted that counsel did not investigate the case, identify or interview any potential witnesses, give him a copy of a motion to suppress evidence, or let appellant look at any records in his file. Appellant did not know whether the State had provided counsel with any documentation about the case. And he did not remember whether counsel had interviewed the complainant or anyone else who had been present at the scene. Trial counsel simply did not discuss "any of that" with appellant.

Appellant further testified that his trial counsel did not refer him to an immigration attorney and did not properly advise him of the immigration consequences of his plea. When asked whether he was "a resident alien" in 1999, appellant answered that he "was in the process" and "had a work permit and permission to travel." He explained that he "plead[ed] to a term of probation" "not [being] a citizen of the United States," because counsel "told" him that he "wasn't going to have any problems." According to appellant, when counsel asked him whether he had "documentation," he "said yes." Counsel then "said 'Okay. Put your initials here.'" He "told" appellant "All you need to do is complete your probation and everything will be fine." Counsel did not "make [him] sign the plea paperwork," but told him, "You are not going to have problems. Sign it." Appellant

acknowledged that the papers that he had signed "discussed the immigration consequences," but he did not understand what he was signing, "a certified interpreter" did not go over the papers with him, and he did not ask any questions about the immigration consequences of his plea. In his affidavit, submitted with his habeas applications, appellant testified that the documents that he signed "were English language documents" and he "did not understand those documents."

Appellant noted that "[t]hey detained [his] residency" and he "had a lot of problems with [his] health, depression" and "had work problems." He explained that he signed the plea paperwork because he "was going through a depression crisis," which "was very strong." Although he was on medication for depression, he did not feel "intimidated or pressured." However, appellant was scared because he "was afraid to go to jail" and "to be removed from this country because of [his] children." He further explained that he signed "the plea paperwork willingly, knowingly and voluntarily," but did not sign it "knowingly" because "[he] didn't know the consequences" and counsel did not explain them to him. Although appellant testified that his depression was a factor in motivating him to plead guilty, he stated that "he decided to plead because of the merits of the case." He was also aware that the complainant had signed an affidavit stating that her injuries resulted from an accidental fall, and he would have used this affidavit at trial.

Appellant admitted that in 2005, he was arrested for, and pleaded guilty to, "a DWI second." And the State offered, and the trial court admitted, a certified copy of a February 9, 2005 judgment of conviction for the misdemeanor offense of driving while intoxicated—second offense, which reflects that appellant pleaded guilty to the offense and true to the enhancement allegation.[4]

The complainant testified that she and appellant divorced in 2000 or 2001, and had three children together. They "get along pretty good," have "a friendly relationship," and see each other "regularly" whenever he picks up their daughter, who has been "under her care" since 1999.

In regard to the underlying offense, the complainant explained that one night in August 1999, she "went into work" at the Pasadena Citizen, a newspaper, and "all the machines were down." While waiting to see whether "they could bring them up," she went outside to talk with Herrera, a co-worker, "in his truck that night." Appellant then "showed up." When the complainant "saw him coming toward the car" while "talking" to her she "tried to run." She "got off the truck, and [she] had to run because [she] thought [appellant] was going to hurt [her]." When asked whether appellant had "pulled [her] out of the truck," the complainant

[4] Appellant objected to the admission of the judgment as irrelevant. In response, the State asserted that appellant was required to establish "a collateral legal consequence" and "the actual collateral legal consequence [was] due to the 2005 arrest, not this 1999 arrest."

answered, "No. When I was going to get off that truck he was going to try to stop me, and I yanked off and tried to pull off because I thought he was going to grab me and hit me." She then ran into her workplace and hid from appellant because she "was afraid since he had never seen [her] in someone else's car or talking to anybody for him to say, 'Hey. What is she doing there?'" Although she testified in her affidavit that appellant "[had] never been aggressive," she "felt the need to run and hide" because:

> [she] didn't know how [appellant] was going to take it. It's one thing for you to be in a relationship and never have a problem and all of a sudden your husband shows up and you know you see him going towards the truck, but then he's asking what are you doing. You don't know what is going to be his next reaction and what he's going to do.

When she ran into the building, an unidentified person "called 911 thinking that [she] needed help to [be] protected."

The complainant further testified further that she made a statement "at the time of the incident" because she "was afraid of what could have occurred afterwards with [her] relationship" with appellant. She "had been in a previous abusive relationship and [she] was just afraid." The complainant "claimed that" appellant had "hit" her, "but, no, he didn't hurt me at the time." She explained that she had told law enforcement officers that appellant had "pulled [her] out of the truck by [her] hair" because she "was scared of his reaction" and "nervous at the same time back then." The complainant believed that there were "inconsistencies

with the police report" and it included "stuff that shouldn't have been there." She noted that although the report referred to appellant as carrying "a gun," he did not have a firearm at the scene and she did not "know who said he had a gun or that he carried a gun because he never had a gun." She explained that her July 27, 2016 affidavit, included with appellant's habeas application, is "the correct one."

In regard to her July 27, 2016 affidavit, the complainant explained that appellant's current attorney asked her "to do the affidavit." She noted that:

> they called me in . . . to see what had happened at the time of the incident and time has passed by. I mean, it's been years, and we have been able to keep a good relationship even though that incident happened. I ain't got nothing . . . against [appellant]. So I just have to say what it is, and it is what it is.

The attorney "told" the complainant "to write [in her] own words what it was for [her] in order to do it so it could be signed with a notary." During the week between when the attorney had asked her to prepare the affidavit and when she actually wrote it, she saw appellant, but told him that she did not want to talk about it, she was "writing it," and she was "doing it by [her] will and words."

The record reflects that the trial court read and considered the complainant's July 27, 2016 affidavit. In her affidavit, the complainant testified that "[o]n or about 08/09/1999 an incident occurred in the city of Pasadena, Texas, outside of my place of work when I was talking to a friend of mine named Gabriel Herrera, then

[appellant] my then husband arrived at the place and we started having an argument." She further testified:

1. I never heard that [appellant] threatened us that he would return later on with a gun.

2. I never saw [appellant] hit Gabriel Herrera as he (Herrera) claimed on the police report.

3. I . . . never saw the police report regarding the incident . . . dated 08/09/1999. The police never [handed] me a police report for the incident.

4. The ambulance was called to the scene and [I] was seen by the paramedic, but there was mild injury and no need for hospitalization and I did not want to go to the hospital.

5. The injury that I had on my head was because I stumbled on an uneven pavement. The injury that I had on my head was not the result of a physical injury caused by [appellant].

6. I [was] afraid when I was having the argument with [appellant] and I may have said things that may have not been true to protect myself, because in the past I was in an abusive physical relationship with another man.

7. The pain I had on my arm and head were not caused by a physical assault committed by [appellant]. The pain I had on my arm and head were caused by the stumble[] I had on the uneven pavement that was on the street.

8. The argument we had on 08/09/1999 did not result on physical assault by [appellant]. It was only verbal aggression between me and [appellant].

9. Mr. Gabriel Herrera saw and heard the verbal confrontation that [appellant] had with me because of jealously.

10. [Appellant] never carried a gun, we did not have a gun in the house.

11. [Appellant] never attacked me physically or caused me physical damage on the date the incident occurred which was 08/09/1999.

12. [Appellant] was never aggressive with me and my children, for the seven years that we were married.

13. [Appellant] was always a good husband and a good father for the seven years that we had the husband and wife relationship.

14. At the present time we (me and my children) keep a good relationship with [appellant].

Appellant's trial counsel testified that he "do[es] criminal defense and immigration law" and has practiced in Harris County, Texas, since 1997. He noted that appellant "look[ed] familiar," but he did not "actually remember him" or the details of his case. "Looking at the misdemeanor plea of guilty," counsel admitted that the handwriting on the document was his and he "definitely did represent" appellant.[5] Counsel explained that he is "proficient" in speaking Spanish, "but [is] not bilingual," and he believed that in 1999 he used a translator "[t]o explain what we were doing and to translate what I was telling [appellant]." Although he thought he had "a secretary with [him] that would have translated," appellant's "document was translated by Anthony Limitone who is an attorney here in Harris County." Additionally, on appellant's "form the section in regards to his immigration

[5] The State asked the trial court to take judicial notice of appellant's "criminal file," and the court answered, "Yes, I'm going to take care of some judicial notice on different things here in a little bit, but I will take that." The documents are not included in the record filed in this Court.

situation is underlined." Counsel did not think that he "underlined that," but if the handwriting was "Judge Wilkerson's handwriting, then she actually underlined the section of the plea . . . where it says that if you were not a citizen of the United States, a plea could result in deportation." He noted that "Judge Wilkerson was on the bench" in 1999.

When asked whether he had "any specific practices [he] employed [in] every case of [d]efendants," who were not United States citizens, counsel answered that he "definitely warned them this is a deportable crime." And he believed that he warned appellant that the misdemeanor offense of assault of a family member "was a deportable crime, but [he] obviously [could not] remember exactly what [he] told [appellant] 17 years ago." Counsel explained that he warned each client "that could face potential immigration consequences that those consequences were something they need[ed] to think about." And he believed that in 1999, he warned noncitizen clients "that there could be potential immigration consequences."

On cross-examination, counsel noted that he did not know the date on which he had been hired or appointed in the case, the date of the incident, the date of appellant's plea, or the frequency of his contact with appellant between the date of the incident and the date appellant pleaded guilty. He recalled the underlying offense in this case "because of the writ" and reading "a summary of the case." However, after reading the summary, he did "not remember this case." Counsel no

longer had appellant's file, thought he "would have had a client information sheet and a contract and . . . whatever [his] notes were on the case," and did not recall whether he would have translated "the intake form" into Spanish. He further noted that he did not recall what he discussed with appellant, but he "assum[ed] that [he] discussed the specifics of the case with [appellant] as [he does] with all [his] clients." Counsel also did not recall whether he had identified any possible defense witnesses for appellant or interviewed the complainant, and he did not know whether he spoke to any witnesses. He noted that he would not have given appellant the police report because "in 1999 we didn't get copies of police reports, and certainly he [would not] be entitled to a copy of the police report."

Counsel further testified that he "had just started practicing immigration law" in 1999 and did not remember whether appellant was a legal permanent resident but "the plea form was underlined in regards to naturalization and immigration for a reason." When asked if appellant had "a legal permanent resident card, would [he] have advised [appellant] to plead guilty at that time," counsel answered, "I think he ultimately would have made the decision whether or not to plead guilty. I advised [appellant]."

In its closing argument, the State argued, in part, that the doctrine of laches barred any habeas relief because appellant's unreasonable delay of seventeen years in pursuing relief prejudiced the State's ability to respond to his habeas claims.

Appellant responded that "[o]ne of the ramifications of the plea" was that he lost "his status here in the United States. And because of that he has been unable to physically exercise his right to file a writ in this case."

At the end of the hearing, the trial court made the following findings of fact:

> Based on the record and everything in this case and [appellant's] history in Court 9—he actually took the plea September of 1996 on the first DWI with a Spanish speaking lawyer. [Trial counsel] represented him in October of 1999. I was present for both pleas. English is my second language. So I always listen to the lawyers and/or interpreters in explaining what's being said. So if it's incorrect, I stop the plea.
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> I have always since day one, that's January of '95 always—I don't do probation without a lawyer. I don't do a Spanish speaker without an interpreter. I always admonish there's an immigration consequence since January of '95, and I always tell them the more cases you have, the more problems you are going to have with immigration. So he heard it from me twice starting on that assault day. He heard it in 1996 and 1999. I don't know whether or not he heard it in 2005, but this is, like he said, 17 years later.
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> Also, looking at the documents on the plea it looks like a part was underlined. There's two black writings on this. One is [trial counsel] and one is Anthony Limitone. It looks like the heavier ink is Anthony Limitone. So it appears to the Court Anthony Limitone underlined this because I didn't. It doesn't look like it was [trial counsel's] practice based [on] his testimony. I'm familiar with Limitone and [trial counsel]. They both have a good reputation in the community for representing people and admonishing them of these things.
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> When [appellant] was testifying he said he's never been in anything like that before and that's why he testified, but he had been in my court 3 years before and warned of the immigration consequences at that time. It also looks like [trial counsel] was here for at least four of the settings, and it looks like the date it was originally set for a plea in October, the original rec that was written on

> the reset was for 60 days. He took a probation instead with three days as a condition, and I find it kind of incredulous he would plead to time in jail if he was actually innocent to do three days as a condition.
>
> Also, according to [the complainant's] affidavit she said [appellant] didn't go after Gabriel Herrera. So it looks like there may have been two complainants in this case which is why they neglected—did three days as a condition on the original probation on the case. I'm assuming any 911 or anything which would be helpful on this kind of case is no longer available 17 or 18 years from the date of the incident.
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> So at this time I'm finding this writ barred by Laches.

During the hearing, the trial court took "judicial notice that [trial counsel] doesn't remember." The trial court denied appellant's requested habeas relief.

Standard of Review

Generally, an applicant seeking post-conviction habeas corpus relief must prove his claims by a preponderance of the evidence. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002). We view the facts in the light most favorable to the trial court's ruling. *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). In a post-conviction habeas corpus proceeding, the trial judge is the sole finder of fact. *See Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011); *Ex parte Martinez*, 451 S.W.3d 852, 856 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). We afford almost total deference to the court's findings of fact that are supported by the record, especially

when the trial court's fact findings are based upon an evaluation of credibility and demeanor. *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006) (quoting *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004)); *Ex parte Peterson*, 117 S.W.3d at 819. We afford the same level of deference to the trial court's rulings on "applications of law to fact questions" if the resolution of those questions turn on an evaluation of credibility and demeanor. *Ex parte Peterson*, 117 S.W.3d at 819. In such instances, we use an abuse-of-discretion standard. *See Ex parte Garcia*, 353 S.W.3d at 787. However, if the resolution of those ultimate questions turns on an application of legal standards absent any credibility issue, we review the determination de novo. *See Ex parte Peterson*, 117 S.W.3d at 819.

Actual Innocence

In his second issue, appellant argues that he is entitled to habeas relief because "new, credible evidence demonstrates that [he] is innocent."[6] He asserts

[6] The trial court concluded that laches barred "this writ." However, "the equitable principles" that may defeat the State's reliance on the defense of laches include a record that reveals that "the applicant is entitled to equitable relief for other compelling reasons, such as new evidence that shows he is actually innocent of the offense." *See Ex parte Perez*, 398 S.W.3d 206, 218 (Tex. Crim. App. 2013); *see Ex parte Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002) ("There is nothing equitable about permitting an innocent person to remain in prison when he produces new evidence that unquestionably shows that he did not commit the offense for which he is incarcerated."). And on appeal, the State argues that the doctrine of laches bars only appellant's claims of involuntary plea and ineffective assistance. Accordingly, we consider the merits of appellant's claim of actual innocence and address laches only in regard to appellant's claims of involuntary plea and ineffective assistance.

that the "new evidence" need not be "newly discovered," but "can be evidence that is newly available." He also asserts that "[t]he applicable question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[7] (Internal quotations omitted.) *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). And he asserts that he "should have been allowed to present the defense theory at trial that he did [not] assault and cause bodily injury" to the complainant and "her injuries were the result of an accidental fall." Appellant concludes that this evidence demonstrates that "a jury of his peers should have had the opportunity to hear the evidence" and "he would have been acquitted." The State argues that appellant has not met his burden to show actual innocence because the complainant's affidavit and the hearing testimony do not "unquestionably establish appellant's innocence of assaulting [her]."

A claim of actual innocence may be raised in a collateral attack on a conviction by an applicant who pleaded guilty to committing an offense. *Ex parte Tuley*, 109 S.W.3d 388, 390–91 (Tex. Crim. App. 2002) (citing *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996)). The applicant must overcome the presumption that his conviction is valid and show that the new evidence

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[7] The sufficiency-of-the-evidence standard of *Jackson v. Virginia*, is not applicable to an actual innocence claim asserted in a habeas corpus proceeding. *See Ex parte Elizondo*, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996) (concluding standard "is simply not appropriate" in evaluating actual innocence claim asserted in a habeas proceeding).

"unquestionably establishes his innocence." *Id*. at 390 (citing *Elizondo*, 947 S.W.2d at 208–09). That is, "an applicant must show 'by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.'" *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) (quoting *Ex parte Tuley*, 109 S.W.3d at 392). The trial court examines the "newly discovered evidence" and determines whether the "new" evidence, when balanced against the "old" inculpatory evidence, unquestionably establishes the applicant's innocence. *Ex parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). Evidence is considered "newly discovered" if it was not known to the applicant at the time of the trial, plea, or post-trial motions and could not have been known to the applicant even with the exercise of due diligence. *Ex parte Brown*, 205 S.W.3d at 545. "If the applicant entered a guilty plea, the guilty plea—along with any evidence entered, or stipulation to the evidence, supporting the plea—must be considered in weighing the old evidence against the new evidence." *Ex parte Mello*, 355 S.W.3d 827, 831 (Tex. App.—Fort Worth 2011, pet. ref'd); *see Ex parte Tuley*, 109 S.W.3d at 392 ("A convicting court is not free to ignore a guilty plea when reviewing a collateral attack.").

Here, appellant asserts that the newly available evidence presented in the complainant's affidavit raises a defensive theory that he did not assault her and

would have resulted in his acquittal at a trial. However, even assuming that the evidence is newly available, it does not constitute clear and convincing evidence that unquestionably establishes appellant's innocence.

An individual commits the offense of assault on a family member if he "intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." TEX. PENAL CODE ANN. § 22.01(a)(1) (Vernon Supp. 2017). Under the Texas Penal Code, "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." *Id.* § 6.04(a) (Vernon 2003); *see Garcia v. State*, 112 S.W.3d 839, 852 (Tex. App.—Houston [14th Dist.] 2003, no pet.). And "[t]he manner and means of the bodily injury alleged is not an essential element of the offense . . . ." *Thomas v. State*, 303 S.W.3d 331, 333 (Tex. App.—El Paso 2009, no pet.).

The record reveals that on August 9, 1999, the appellant was "pretty angry" when he saw the complainant with Herrera, and she and appellant argued. After exiting Herrera's truck, the complainant ran from the parking lot into her workplace and she hid from appellant because she did not know how appellant would react. According to the complainant, an unidentified person called for emergency assistance because the caller thought that the complainant needed protection. The

complainant subsequently told law enforcement officers that appellant had "pulled [her] out of the truck by [her] hair" and she "claimed that [he] had hit [her]." Appellant pleaded guilty to the misdemeanor offense of assault of a family member, namely, the complainant. And he testified that he decided to plead guilty because of the merits of the case.

According to appellant, the newly available evidence on which he relies to establish his innocence is set out in the complainant's affidavit. In her affidavit, she testified that her injuries did not result from "a physical assault committed by [appellant]" or "a physical injury caused by [appellant]," but from stumbling on uneven pavement. She stated further that the argument with appellant "did not result [in] physical assault by [appellant]" but "was only verbal aggression." Her affidavit testimony, however, lacks detail explaining how she exited Herrera's truck that night and other details about the confrontation with appellant. Further, when asked at the hearing how she had exited the truck, she answered, "When I was going to get off the truck [appellant] was going to try to stop me, and I yanked off and tried to pull off because I thought he was going to grab me and hit me." Although the complainant testified that she had lied to law enforcement officers, her affidavit testimony states only that she "*may* have said things that *may have not been true*." (Emphasis added.) And at the hearing, the complainant testified that "the attorney"

asked her "to do" the affidavit and she knew she needed to sign an affidavit "when they called me in . . . to see what had happened at the time of the incident."

Considering the evidence in the light most favorable to the trial court's ruling, we conclude that appellant has failed to unquestionably prove by clear and convincing evidence his claim of actual innocence.

We overrule appellant's second issue.

Laches

In his first and third issues, appellant contends that the trial court erred in denying his application because he entered his plea involuntarily and his trial counsel rendered ineffective assistance. In the trial court, the State asserted that the doctrine of laches bars appellant's requested habeas relief. And on appeal, it asserts that the trial court did not abuse its discretion in concluding that "this writ [is] barred by [l]aches."

Laches is an equitable doctrine that bars an applicant's habeas claim if his unreasonable delay in raising the claim results in prejudice to the State. *See Ex parte Perez*, 398 S.W.3d 206, 210–11 (Tex. Crim. App. 2013) (citing *Ex parte Carrio*, 992 S.W.3d 486, 487–88 (Tex. Crim. App. 1999)). The Texas Court of Criminal Appeals has explained that the defense of laches "typically requires proof by a preponderance of the evidence of two elements: unreasonable delay by the opposing party and prejudice resulting from the delay." *Id.* at 210 n.3. In

determining the issue of laches in habeas corpus cases, courts are to consider the totality of the circumstances, i.e., "factors such as the length of the applicant's delay in filing the application, the reasons for the delay, and the degree and type of prejudice resulting from the delay." *Id*. at 217. In regard to prejudice, "a court may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial." *Id.* However, even if the State presents proof of prejudice, a court "must then weigh that prejudice against any equitable considerations that militate in favor of granting habeas relief." *Id.*

As to the degree of proof required, "the extent of the prejudice the State must show bears an inverse relationship to the length of the applicant's delay." *Id.* Thus, "the longer an applicant delays filing his application, and particularly when an applicant delays filing for much more than five years after [the] conclusion of direct appeals, the less evidence the State must put forth in order to demonstrate prejudice." *Id*. at 217–18. Although it has not adopted a bright-line rule, the court of criminal appeals has recognized that a delay longer than five years "may generally be considered unreasonable in the absence of any justification for the delay." *Id.* at 216 n.12.

Here, appellant, in his reply brief, asserts that his delay in seeking habeas relief is not unreasonable and the State is not materially prejudiced by the delay.

Appellant pleaded guilty and was convicted in 1999. He filed his habeas application in 2016, approximately seventeen years after his conviction became final and approximately fifteen years after his sentence was discharged. At the hearing on his habeas application, his trial counsel testified that he did not recall appellant or the details of his case, and he no longer had appellant's file. Moreover, appellant did not recall some of the details of his 1999 trial court proceedings. The record reveals that the complainant's co-worker saw the incident, an unidentified person called for emergency assistance, and law enforcement officers were dispatched to the scene. The record, however, does not indicate the availability of any witnesses other than appellant and the complainant or the availability of any other evidence. And, in its findings, the trial court noted the probability that "any 911 or anything which would be helpful on this kind of case is no longer available 17 or 18 years from the date of the incident." Accordingly, the record supports a conclusion that the State has been prejudiced in its ability to respond to appellant's claim that his counsel rendered ineffective assistance and retry its case. *See Ex parte Roberts*, 494 S.W.3d 771, 776 (Tex. App.—Houston [14th Dist.] 2016, pet, ref'd) ("Diminished memories and lost evidence weigh heavily in favor of laches.").

Further, the record does not reveal any justification for appellant's delay in seeking habeas corpus relief. In his habeas application, appellant argues that he is confined and restrained because "he is not legally allowed in the United States and

is subject to deportation proceedings." At the hearing on his habeas application, he asserted, in closing, that "[o]ne of the ramifications of the plea" was that he lost "his status here in the United States" and "has been unable to physically exercise his right to file a writ in this case." In his reply brief on appeal, he argues that his delay in seeking habeas relief was not unreasonable because "it was due to justifiable excuse or excusable neglect." He asserts that although "years passed before he received appropriate guidance on the immigration consequences of his plea, he acted quickly based on the newly accurate and available information" in filing his habeas application.

At the hearing, appellant testified that "[t]hey detained [his] residency" but he did not present any evidence to show when he was "detained," when he may have lost his status in the United States, or when he became subject to deportation proceedings such that he was unable to file a habeas application. Further, appellant did not present any evidence to establish when he received "appropriate guidance on the immigration consequences of his plea." Trial counsel's hearing testimony, however, indicates that he advised appellant that the underlying offense was a deportable crime at the time he pleaded guilty. And the evidence shows that appellant pleaded guilty to another misdemeanor offense in a trial court proceeding in Harris County in 2005. Further, appellant provided no indication as to when he first learned about the information that the complainant included in her affidavit.

She testified that she knew she needed to sign an affidavit "[w]hen they called me in . . . to see what had happened at the time of the incident." However, the record shows that she and appellant have a good relationship and have visited "regularly" since 1999.

Considering the evidence in the light most favorable to the trial court's ruling and deferring to the trial court's findings supported by the record, we hold that the trial court did not err in concluding that laches bars appellant's habeas relief as to his claims of involuntary plea and ineffective assistance of counsel.

We overrule appellant's first and third issues on appeal.

Conclusion

We affirm the order of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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