Affirmed and Memorandum Opinion filed March 8, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00652-CR

JOSE ALFREDO DOMINGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 1434552

M E M O R A N D U M O P I N I O N

A jury convicted appellant Jose Alfredo Dominguez of capital murder, and the trial court sentenced him to life in prison. Appellant filed a timely notice of appeal and challenges his conviction on three grounds: (1) he received ineffective assistance of counsel, (2) the trial court erred by overruling his request for a jury charge authorizing a conviction for the lesser-included offense of felony murder, and (3) the trial court erred by failing to conduct a hearing on appellant's motion for new trial.

We hold that the record is insufficient to conclude that trial counsel rendered ineffective assistance, and the trial court did not abuse its discretion in allowing appellant's motion for new trial to be overruled by operation of law. Finally, the trial court did not err in refusing to charge the jury on the lesser-included offense of felony murder because the record provides no affirmative evidence that felony murder was an appropriate charge. We therefore affirm the trial court's judgment.

BACKGROUND

A. The murder

Appellant spent the evening and early morning of March 30 and 31, 2012, smoking crack cocaine at the apartment of his friend, Lawrence "Peanut" Routte. Routte testified that appellant went downstairs to the apartment of the complainant, Ercile Johnson, to buy the crack. Johnson lived in the Fox Apartments in Baytown, Texas and was known in the area as a small-time crack dealer who sold to friends and neighbors. After they finished smoking, appellant told Routte that he was leaving to get money for more crack. As he was leaving, he attempted to grab a screwdriver from Routte's counter, but Routte did not allow him to take it.

Appellant returned to Routte's apartment almost an hour later. Routte testified that appellant was covered in blood and was no longer wearing his shoes or glasses. Appellant had two crack rocks in his hand. Appellant told Routte and a woman named Tonisha Tillis that he was robbed, but they were suspicious. They noticed that appellant was distressed, jumpy, and in a hurry to leave despite Tillis's concern that the men who robbed him might still be outside. Appellant asked Routte for a change of clothes. Routte gave appellant a pair of shorts, and they smoked the two crack rocks before appellant left.

B. The investigation

The following morning, Officer John Tacito of the Baytown Police Department (BPD) was dispatched to the Fox Apartments in response to a deceased-person call. When he arrived, Officer Tacito entered the Johnson apartment, where he discovered Johnson's body on the floor. The apartment was disheveled; blood saturated the carpet and splattered the walls, appliances, and furniture. BPD secured the scene and began its investigation. Detective Edgar Elizondo soon identified appellant as a person of interest.

Detectives discovered appellant's shoes and glasses in Johnson's apartment. They also learned that Johnson's cell phone and white truck were missing. Police tracked Johnson's phone to Samuel Matthews, who told police that a man matching appellant's description had sold it to him out of a white truck near the intersection of Crosstimbers and Airline in Houston. According to Matthews, appellant traded the phone for approximately $6 worth of crack cocaine.

While searching for Johnson's truck, BPD Detective Juan Reyes found appellant standing in front of a gas station near the Crosstimbers and Airline intersection. Detective Reyes noticed that appellant looked tired and run down, had a limp, and was not walking well. After talking to Detective Reyes, appellant agreed to speak with detectives further at the police station.

At the station, appellant provided a videotaped statement. Detective Elizondo conducted the interview and noticed that appellant had cuts and scrapes on his hands consistent with stabbing someone. Detective Elizondo also collected and photographed appellant's underwear, which were covered in blood. During the interview, appellant was advised of his rights regarding an interrogation,[1] and he agreed to waive his rights

[1] *See* Tex. Code Crim. Proc. Ann. art. 38.22 § 3 (West Supp. 2015).

and continue speaking with detectives. Appellant admitted to stabbing Johnson, but claimed that he attacked Johnson out of self-defense. Appellant also admitted to taking Johnson's drugs and truck.

Following appellant's interview, Detective Elizondo located Johnson's truck abandoned near the Crosstimbers and Airline intersection. Detective Elizondo also interviewed a witness named William Johnson, who he believed was with appellant when appellant sold the complainant's phone to Matthews. The witness led Detective Elizondo to a bridge that crossed a bayou next to the gas station at Crosstimbers and Airline. Underneath the bridge, Detective Elizondo discovered a yellow bag containing a pair of shorts stained with blood.

C. The trial

At the guilt-innocence phase of trial, the State called ten witnesses and introduced nearly 300 exhibits. The assistant medical examiner, Dr. Darshan Phatak, testified that Johnson received 175 stab and incise wounds located primarily on his head. One of the stab wounds was inflicted with sufficient force to cause part of the blade to break off in his skull. Dr. Phatak characterized the wounds as consistent with someone who was holding his hands in front of his face in a defensive posture.

Kacie Waiters, a DNA analyst, also testified. She analyzed the DNA found at the murder scene, in the truck, on Johnson's body, on appellant, on the underwear Detective Elizondo collected from appellant, and on the shorts found in the yellow bag. She found that appellant could not be excluded as a contributor to the DNA found on Johnson's left pocket and on the hammer and knife found in Johnson's apartment. She also concluded that Johnson was the major contributor to the blood discovered on appellant's underwear and the shorts found in the yellow bag.

Following the State's case-in-chief, the defense rested. Although defense counsel

did not call any witnesses, he cross-examined each of the State's witness and made numerous objections, some of which were sustained. The trial court instructed the jury on capital murder, murder, and self-defense. Appellant requested the inclusion of a felony-murder instruction, but the trial court denied the request. The jury convicted appellant of capital murder, and the trial court sentenced him to life in prison without parole.

ANALYSIS

Appellant contends in his first issue that he received ineffective assistance of counsel. In his third issue, he argues the trial court abused its discretion when it failed to conduct a hearing on his motion for new trial alleging ineffective assistance of counsel. Because these issues are related, we examine them together.

I. Motion for new trial based on ineffective assistance of counsel

Appellant filed a timely motion for new trial and request for evidentiary hearing on the ground that he received ineffective assistance of counsel. Appellant alleges his trial counsel failed to conduct an independent investigation into the facts of the case, adequately prepare for trial, seek out and interview material witnesses, and request or secure a DNA expert or investigator. Appellant's Harris County jail visitation log was the only supporting evidence attached to the motion. After 75 days had expired without a ruling, the motion was denied by operation of law. Tex. R. App. P. 21.8(c). On appeal, appellant argues that counsel was ineffective and that the trial court abused its discretion by failing to conduct a hearing on the motion for new trial.

A. Standard of review and applicable law

The purpose of a hearing on a motion for new trial is to decide whether the cause shall be re-tried and to prepare a record for presenting issues on appeal in the event the motion is denied. *Smith v. State*, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009).

Although the hearing is often critical to the development of the record for appeal, the defendant does not have an absolute right to such a hearing. *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). To be entitled to a hearing on a motion for new trial, the movant must (1) raise one or more matters not determinable from the record and (2) establish the existence of reasonable grounds showing that he could be entitled to relief. *Smith*, 286 S.W.3d at 339; *Reyes*, 849 S.W.2d at 816 (explaining that to obtain hearing, evidence supporting motion for new trial must "specifically show[] the truth of the grounds of attack," that is, "reflect that reasonable grounds exist for holding that such relief could be granted").

We review a trial court's denial of a hearing on a motion for new trial for an abuse of discretion. *Id*. The denial will be reversed only when the trial judge's decision was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *State v. Gonzalez*, 855 S.W.2d 692, 695 n.4 (Tex. Crim. App. 1993). Abuse of discretion exists when the movant meets the criteria but the trial court fails to hold a hearing. *Smith*, 286 S.W.3d at 340.

A complaint of ineffective assistance of counsel may be raised in a motion for new trial. *Reyes*, 849 S.W.2d at 815. Under the two-pronged standard of *Strickland v. Washington*, appellant must first establish that counsel's performance was deficient. 466 U.S. 668, 687 (1984). This prong requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. *Id*. Second, appellant must show that the deficient performance prejudiced the defense. *Id*. To meet this prong, there must be a reasonable probability that, but for counsel's errors, the result would have been different. *Id*. at 694.

For a defendant to be entitled to a hearing on his motion for new trial alleging ineffective assistance of counsel, he must allege sufficient facts from which a trial court could reasonably conclude that both *Strickland* prongs have been met. *See Buerger v.*

State, 60 S.W.3d 358, 363 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (holding that trial court had not abused its discretion in not holding a hearing on appellant's motion for new trial because appellant "failed to explain or demonstrate that the significance of [his attorney's] actions, if true, were deficient or how they harmed him").

B. Appellant has not demonstrated the trial court abused its discretion by not holding a hearing on his motion for new trial.

1. Appellant's motion raises matters outside the record.

Appellant's motion raises several matters not determinable from the record because his claim of ineffective assistance of counsel is based primarily on omissions. Specifically, appellant contends his counsel failed to conduct an independent investigation into the facts of the case, failed to adequately prepare for trial, failed to seek out and interview material witnesses, and failed to request or secure a DNA expert or investigator.

Establishing ineffective assistance of counsel through omission is difficult to do on direct appeal because, in most cases, such errors are not apparent from the record. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) ("'[W]here the alleged derelictions primarily are errors of *omission* de hors the record rather than commission revealed in the trial record, collateral attack may be . . . the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record.'" (quoting *Ex parte Duffy*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980))). Without additional information in the record, we are unable to evaluate these allegations or determine whether they constitute error. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002) ("The reasonableness of counsel's choices often involves facts that do not appear in the appellate record."). Because appellant's claim of ineffective assistance of counsel is not determinable from the record, we must decide whether his

motion and accompanying evidence show reasonable grounds that could entitle him to relief. *Reyes*, 849 S.W.2d at 815.

2. Appellant's motion does not establish reasonable grounds for granting relief.

To show he is entitled to relief, appellant's motion for new trial must be supported by an affidavit, either of the defendant or someone else, specifically setting out the factual basis for the claim. *King v. State*, 29 S.W.3d 556, 569 (Tex. Crim. App. 2000). Although appellant does not have to establish a *prima facie* case, he must include sufficient facts to provide reasonable grounds in support of the claim. *Smith*, 286 S.W.3d at 339. Specifically, appellant must include sufficient facts to support his claim that his counsel's performance was deficient and that he was prejudiced by that performance. *See Strickland*, 466 U.S. at 687.

Appellant did not submit an affidavit in support of his motion for new trial. The only evidence appellant provided in support of the motion for new trial (other than copies of the charging instruments and judgment) was appellant's jail visitation record, which was attached to a business record affidavit from the Harris County Sheriff's Office. The jail visitation log shows appellant's trial counsel visited appellant on only one occasion for approximately seven hours on July 20, 2014, two days before trial began. Examining each allegation in turn, we conclude appellant's motion and the attached affidavit do not provide sufficient facts to show reasonable grounds that could entitle him to relief.

Turning to the first *Strickland* prong, appellant alleges his trial counsel's performance was deficient because he failed to seek out and interview witnesses or conduct any meaningful preparation or investigation for trial. We address these two arguments together because adequately investigating and preparing for trial includes, among other things, interviewing and presenting witnesses. *Perez v. State*, 403 S.W.3d

246, 250 (Tex. App.—Houston [14th Dist.] 2008), *aff'd,* 310 S.W.3d 890 (Tex. Crim. App. 2010). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Trial counsel also has the responsibility to seek out and interview potential witnesses. *State v. Thomas*, 768 S.W.2d 335, 336 (Tex. App.—Houston [14th Dist.] 1989, no pet.). Failure to do so is considered ineffective assistance of counsel when such failure prevents the defendant from advancing a viable defense. *Id.*

Appellant argues the record contains "ample evidence" counsel did not investigate the facts of the case. He points to the lack of evidence in the record showing trial counsel used an investigator. We cannot assume, however, that because a record is silent as to the depth of an attorney's investigation, he made no such investigation. *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). The record does not rule out the possibility that trial counsel used an investigator or investigated the facts of the case on his own, nor does the record indicate counsel had insufficient knowledge of the underlying facts or law. Without any affirmative evidence that appellant's counsel failed to investigate, we cannot assume trial counsel made no investigation. *Brown v. State*, 129 S.W.3d 762, 767 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Appellant also generally claims that an investigation could have revealed exculpatory information, such as information relating to other possible suspects. Bare assertions, however, do not establish facts entitling appellant to a hearing on his motion for new trial. *See King*, 29 S.W.3d at 569. A claim of ineffective assistance based on trial counsel's general failure to investigate the facts of the case fails absent a showing of what the investigation would have revealed that reasonably could have changed the result of the case. *Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). In the present case, appellant does not point to a particular witness or line of investigation that his counsel should have investigated or show what

further investigation would have revealed. The motion for new trial alleges generally that trial counsel failed to interview the witnesses involved in the case, but does not specifically identify a witness or identify what evidence that witness would have provided. *See King*, 29 S.W.3d at 569 (holding motion for new trial was properly denied without hearing when appellant did not allege what further investigation counsel should have conducted, who his alleged alibi witness was, or how an alibi defense could have been persuasive given the physical evidence and appellant's own statements connecting him with the crime); *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (holding conclusory affidavit that "failed to say what further investigation would have revealed" or what witnesses "would have said to exculpate" defendant did not "put the trial judge on notice that reasonable grounds existed to believe counsel's representation may have been ineffective," and therefore judge did not abuse discretion in failing to hold hearing).

Appellant also alleges his trial counsel failed to adequately prepare because he only met with him on one occasion prior to trial. As reflected by the jail visitation log, appellant's counsel spent approximately seven hours visiting him two days before trial. This fact, on its own, is insufficient to show deficient performance. Appellant does not specifically show how meeting with his counsel further would have benefitted his defense. *See Perrett v. State*, 871 S.W.2d 838, 841 (Tex. App.—Houston [14th Dist.] 1994, no pet.). The visitation log alone also fails to exclude the possibility that trial counsel communicated with appellant in other ways prior to trial. *See id.* (in-court consultations); *see also Harris v. State*, 475 S.W.3d 395, 407 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (communication through detailed letters).

Finally, appellant alleges his trial counsel's failure to request and secure a DNA expert shows deficient performance. In his motion for new trial, however, appellant does not indicate what the DNA expert's testimony would have been or how it would

have rebutted the testimony of the State's expert. Rather, appellant simply claims that "such an expert would have assisted the trier of facts in determining guilt or innocence of the Defendant and the absence of a rebuttal." Such general, after-the-fact speculation cannot support a claim of ineffectiveness. *Flemming v. State*, 949 S.W.2d 876, 880 (Tex. App.—Houston [14th Dist.] 1997, no pet.). After reviewing each of appellant's allegations of deficient performance, we conclude appellant failed to establish that reasonable grounds existed to believe counsel's representation may have been deficient.[2]

In conclusion, appellant's motion for new trial raised several matters not determinable from the record, specifically: the sufficiency of trial counsel's trial preparation and investigation; the possibility that further investigation would have led to exculpatory witnesses and evidence; and whether trial counsel's decision not to use a DNA expert to rebut the State's evidence constituted deficient performance. But appellant failed to establish reasonable grounds to believe that he could, under *Strickland*, prevail on a claim of ineffective assistance of counsel. By failing to provide a factual basis to support his allegations of deficient performance, appellant did not establish his right to an evidentiary hearing. *See King*, 29 S.W.3d at 569; *see also Smith*, 286 S.W.3d at 345. The trial court therefore did not abuse its discretion in failing to hold a hearing on appellant's motion for new trial.

C. The record is insufficient to establish ineffective assistance of counsel.

Appellant also contends that the motion for new trial should have been granted even without holding a hearing. In appellant's view, the present record is sufficient to

[2] Because appellant's motion for new trial does not provide a sufficient factual basis to support a finding that trial counsel's performance was deficient, we need not reach the second prong of *Strickland*. *Stults v. State*, 23 S.W.3d 198, 209 n.7 (Tex. App.—Houston [14 Dist.] 2000, pet. ref'd). Nor do we reach the State's argument on appeal that appellant did not timely present his motion for new trial to the trial court. Tex. R. App. P. 21.6; *see generally Carranza v. State*, 960 S.W.2d 76, 78 (Tex. (Tex. Crim. App. App. 1998).

demonstrate that his counsel provided ineffective assistance because counsel failed to subject the State's case to meaningful adversary testing. We disagree that the present record entitles appellant to relief.

When, as in this case, there is no evidentiary record developed at a hearing on a motion for new trial, it is "extremely difficult to show trial counsel's performance was deficient." *Rodriguez v. State*, 425 S.W.3d 655, 668 (Tex. App.—Houston [14th Dist.] 2014, no pet.). As discussed above, appellant's claim of ineffective assistance is based primarily on omissions, which are not determinable from the record. With a trial record supplemented only by appellant's motion and a jail visitation log, we cannot conclude appellant's counsel was ineffective. *See Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) ("Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective."). Appellant's first and third issues are overruled.

Appellant relies on this court's opinion in *Perez*, in which appellant claims we held the defendant was denied effective assistance of counsel. 403 S.W.3d at 253. Trial counsel met with the defendant only two or three times before trial, interviewed no witnesses before trial, never asked the trial court to appoint an investigator to interview or seek out potential witnesses, and failed to present any witnesses or any other evidence of a defense. *Id*. at 251–52.

Perez is distinguishable from this case in several ways. First, unlike appellant's case, the trial court in *Perez* concluded that the motion for new trial met the requirements for an evidentiary hearing and appointed an investigator. *Id*. at 248.[3] At the hearing, Perez, the trial counsel, the State's attorney, the investigator, Perez's

[3] After trial, Perez's trial counsel filed a motion to withdraw, and the trial court appointed new counsel. *Id*. at 248. The new counsel filed a motion for new trial that alleged, among other things, the previous counsel failed to interview a specific alibi witness. *Id*. At the request of Perez's new counsel, the trial court appointed the investigator to seek out and interview witnesses. *Id*.

mother, and an alibi witness testified. *Id*. The evidence introduced through their testimony provided the facts necessary for the court to conclude Perez's counsel failed to adequately prepare for trial. Specifically, Perez's trial counsel testified that Perez informed him about a specific alibi witness during their first meeting. *Id*. Despite having a year and a half to investigate, counsel did not interview the alibi witness, did not visit her home, never moved for a continuance to interview the witness, and never subpoenaed the witness. *Id*. at 249. Perez's trial counsel also made no attempts to interview Perez's co-defendant, who had already accepted a plea bargain. *Id*. The court-appointed investigator testified that he was able to locate and interview Perez's alibi witnesses, one of whom gave a sworn affidavit. *Id*. at 251. Because of the amount of specific evidence the trial court received regarding Perez's counsel's lack of preparation, the trial court found his performance deficient.

The record in this case lacks such information. Appellant does not give the names of alibi witnesses or affidavits of their testimony, but only generally claims his trial counsel should have investigated witnesses. In his motion for new trial, appellant argues "counsel failed to interview any of the witnesses in this case because [he] believed the whole case was pretty self-explanatory" and concludes that had he done so, any potential discrepancies between their testimonies could have been revealed. The alleged failure of counsel to interview a witness does not demonstrate ineffective assistance when the record is silent as to the witness's identity, whether appellant supplied the name of the witness to counsel prior to trial, whether the witness was willing or available to testify, or what testimony the witness would have provided. *Richard v. State*, 14-99-00954-CR, 2000 WL 977658, at *2 (Tex. App.—Houston [14th Dist.] May 18, 2000, no pet.) (citing *Mallet v. State*, 9 S.W.3d 856, 866 (Tex. App.—Fort Worth 2000, no pet.).

Appellant also mistakes the outcome of *Perez*. We did not hold that Perez's trial

counsel was ineffective, as appellant's brief claims. Although we concluded his counsel performed deficiently in failing to prepare adequately for trial, we held the trial court did not err when it denied his motion for new trial because Perez failed to show a reasonable probability that, but for the alleged deficiencies of his trial counsel, the result of the trial would have been different. *Id.* at 253. Despite the more developed record, Perez failed to provide the factual basis necessary to establish reasonable grounds in support of the second prong of *Strickland*; in this case, the record is insufficient to satisfy *Strickland's* first prong.

For these reasons, *Perez* does not alter our conclusion that, on this record, appellant failed to prove his entitlement to a new trial or a hearing on his motion for new trial. We therefore overrule appellant's first and third issues.

II. Jury charge

In his second issue, appellant argues that the trial court erred by failing to include an instruction authorizing the jury to find him guilty of the lesser-included offense of felony murder. Appellant's trial counsel objected at trial to the lack of a felony-murder instruction and requested that the following language be added: "while in the course of committing a felony, the defendant committed an act clearly dangerous to human life that resulted in the death of complainant." The trial court overruled his objection and denied the request. The jury charge did, however, include an instruction on the lesser-included offense of murder.

A charge on a lesser-included offense should be given when (1) the lesser-included offense is included within the proof necessary to establish the offense charged and (2) there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993).

A. Felony murder is a lesser-included offense of capital murder.

The Court of Criminal Appeals has held that felony murder is a lesser-included offense of capital murder. *Rousseau*, 855 S.W.2d at 673; *accord Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005)*; Jones v. State*, 833 S.W.2d 118, 127 (Tex. Crim. App. 1992). Appellant was charged with capital murder, which required the State to prove that he intentionally committed a murder in the course of committing or attempting to commit a felony—in this case, burglary or robbery. Tex. Penal Code Ann. § 19.03(a)(2) (West 2011). A person commits felony murder if he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. Tex. Penal Code Ann. § 19.02(b)(3) (West 2011).

The offender's culpable mental state is the only difference between the two offenses. Capital murder requires the existence of an intent to cause of death. *Rousseau*, 855 S.W.2d at 673. Felony murder is an unintentional murder committed in the course of committing a felony. *Rodriguez v. State*, 454 S.W.3d 503 (Tex. Crim. App. 2014). The first requirement for charging the jury on a lesser-included offense is therefore met.

B. There is no affirmative evidence supporting a felony murder instruction.

The second requirement is not met, however, because the record contains no affirmative evidence that would permit a jury rationally to find that appellant committed felony murder. To determine whether there is some evidence supporting the lesser-included offense, the appellate court must consider all of the evidence presented at trial. *Rousseau*, 855 S.W.2d at 673. Anything more than a scintilla of evidence is sufficient to require a lesser charge. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

There must, however, be some evidence directly germane to the lesser-included offense for the fact-finder to consider before an instruction is warranted. *Id*. at 24.

The critical question is whether the evidence showed in any way that appellant had only the intent to rob the victim and did not have the intent to kill. *Santana v. State*, 714 S.W.2d 1, 9 (Tex. Crim. App. 1986). The trial court admitted evidence that (1) appellant attempted to take Peanut's screwdriver with him to the victim's apartment, (2) stabbed the victim 175 times,[4] and (3) admitted to detectives that he finished the victim off before stealing a crack bottle and fleeing. Appellant points to no affirmative evidence in the record that negates the State's evidence that appellant had the intent to kill the victim. Rather, appellant's argument is that "the record is wholly devoid of any evidence that Appellant had the intent to commit murder prior to or concurrent with the burglary or robbery of the victim."

The possibility that an offender did not have an intent to cause death initially or at some point during the commission of a robbery, however, does not amount to evidence that the offender did not intend to cause the victim's death at the time the murder was committed. *Nickerson*, 312 S.W.3d at 261. Without citing to any affirmative evidence in the record that would have negated appellant's intent to kill at the time he committed the murder, appellant fails to satisfy the second requirement for an instruction on the lesser-included offense of felony murder.

The trial court did not err in overruling appellant's request for a jury charge

[4] In several cases, Texas courts have concluded that the defendant intended to murder the victim based on the number of times the defendant shot or stabbed the victim. *Schultz v. State*, C14-92-00273-CR, 1994 WL 35576, at *3 (Tex. App.—Houston [14th Dist.] Feb. 10, 1994, no writ) (holding appellant intended to kill victim because he stabbed him twenty-five times); *see Nickerson v. State*, 312 S.W.3d 250, 262 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (mem. op., not designated for publication); *see also Gonzalez v. State*, 296 S.W.3d 620, 626–27 (Tex. App.—El Paso 2009, pet. ref'd).

authorizing a conviction for felony-murder. Because there was no jury charge error, the harm analysis prescribed by *Almanza v. State* is not necessary. 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Appellant's second issue is overruled.

CONCLUSION

Having overruled appellant's three issues, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Brown.
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