No. 14-24-00292-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT

DAYTON ANDRE BOOKER
Appellant

v.

THE STATE OF TEXAS,
Appellee.

On appeal from Trial Court Cause Number 21CR1771 in the 122nd Judicial District of Galveston County, Texas
The Honorable Jeth Jones Presiding

APPELLANT'S ORIGINAL BRIEF

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ORAL ARGUMENT REQUESTED

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DESIGNATION OF THE RECORD ON APPEAL

For the purposes of this appeal, references to the Reporter's Record will be made as RR: vol. ___, p. ___, with the blanks corresponding to the volume number and page number, respectively. References to the Clerk's Record will be made as CR: ___, with the blank corresponding to the page number.

STATEMENT OF THE CASE

This is an appeal from Dayton Andre Booker's conviction of murder in cause number 21CR1771 in the 122nd Judicial District of Galveston County, Texas, the Honorable Jeth Jones presiding. (CR: 445.) On or about March 21, 2024, the jury found Booker guilty of murder. (RR: vol. 6, p. 6.) (CR: 445.) Booker was sentenced by the jury to 29 years confinement in the institutional division of the Texas Department of Criminal Justice. (CR: 445.)

STATEMENT ON ORAL ARGUMENT

Appellant requests this Court hear oral argument in this cause. This case involves multiple and overlapping issues and oral argument would allow Appellant to respond to this Court's questions on the facts and legal arguments.

ISSUES PRESENTED

1. Whether there was sufficient evidence to convict Booker under any theory of murder when there was only a modicum of evidence of him assaulting the victim and there was no forensic evidence linking Booker to the offense.

2. Whether the trial court erred in denying Booker's request for a jury instruction on self-defense when his co-defendant testified that he stated that the victim was going to get a gun.

3. Whether Booker received ineffective assistance of counsel when Booker's trial counsel did not prepare his only witness on the issue of self-defense—Booker's main defensive strategy, failed to ask for a jury instruction on sudden passion, told the jury that Booker would likely only serve half the time they sentence him to, and did not review all of the evidence provided by the State in discovery.

STATEMENT OF THE FACTS

In the evening of May 22, 2021, Appellant Dayton Andre Booker was at the bar Diamond Jim's with a large group of people including the co-defendants—Taylor Requenes, Christopher Gomez, Antonio Figueroa, and Ashton Coleman—Figueroa's wife Crystal Figueroa, and Booker's

half-sister E'Lexus May. (RR: vol. 3, p. 83; vol. 4, p. 27-29; vol. 5, p. 68.) (CR: 10.) At the bar, May was approached by the victim Danny Sanders, who had sexually assaulted her when she was a child. (RR: vol. 5, p. 68-69.) May had not seen Sanders in around 11 years, since the last time he had assaulted her. (RR: vol., 5, p. 85-86.)

May became upset upon seeing and talking to Sanders, and when Sanders "made comments that he['d] seen pictures of [May's younger sister] recently and she looks good," May had to excuse herself to regain her composure. (RR: vol. 5, p. 69.) Her best friend Talia Summlin tried to console her. (RR: vol. 5., p. 69.) After being asked what had happened, she told them that Sanders had sexually assaulted her as a child. (RR: vol. 5, p. 78.)

Ms. Figueroa confronted Sanders, yelled that he was a child molester, and asked him to leave the bar. (RR: vol. 3, p. 83; vol, 4, p. 24 and 30; vol. 5, p. 69.) Eventually, Sanders left, followed closely by Ms. Figueroa, Requenes, and Coleman. Then, Figueroa, Booker, and Gomez leave the bar. (RR: vol. 4, p. 30-33 and State's Exhibit 12.) Requenes testified that he said Sanders was going to get a gun, and Booker and Figueroa started running. (RR: vol. 4, p. 57; vol. 5, p. 96-97.)

In the parking lot, the men caught up with Sanders. Booker "[ran] around the backside of Mr. Sanders's vehicle" and boxed him in. (RR: vol. 4, p. 36.) Detectives Esteban Gonzalez and Jeffrey Winstead, who viewed the surveillance video of the offense, testified that the video showed Booker knocking Sanders to the ground. (RR: vol. 4, p. 65 and 218). After Sanders was taken to the ground, Requenes and Gomez assaulted him, hitting him in the face. (RR: vol. 4, p. 37-38.) Booker was standing to the side and could no longer be seen on the video. (RR: vol. 4, p. 223 and State's Exhibit 14.)

Sanders died from his injuries. (RR: vol. 5, p. 56-57.) The Chief Medical Examiner Dr. Erin Barnhart testified that all of Sanders's injuries were to his face and that those injuries caused his death. (RR: vol. 5, p. 56-57 and 63.).

At trial, counsel for Booker John Powell requested a self-defense jury instruction based on the evidence Requenes provided that he had said Sanders was going to get a gun. (RR: vol. 5, p. 135.) The trial court denied Booker's request. (RR: vol. 5, p. 137.) Booker was convicted and sentenced to 29 years imprisonment. (RR: vol. 6, p. 4; vol. 8, p. 36.) (CR: 444-45.)

Booker's trial was marred by a series of unprofessional errors committed by his attorney Powell. Powell failed to prepare Requenes, his only witness to provide evidence in support of Booker's self-defense theory. (RR: vol. Supp. 1, p. 21, 27, and 30.) He further told the jury that Booker would likely only serve half of the time they sentence him to, failed to ask for a jury instruction on sudden passion, and failed to review all the evidence provide by the State in discovery. (RR: vol. 4, p. 201-03; vol. 7, p. 114-15; vol. 8, p. 25.) (CR: 460-65.) A hearing was held on Booker's motion for a new trial based on this ineffective assistance of counsel, and his motion was denied. (RR: vol. Supp. 1.) (CR: 460-65.)

SUMMARY OF THE ARGUMENT

First, Booker would argue that the evidence was insufficient to support his conviction because "no rational fact-finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt." *Bearnth v. State*, 361 S.W.3d 135, 138 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). The evidence at trial shows either only a modicum of inculpatory evidence or conclusively establishes a reasonable doubt. *Id.*

There was insufficient evidence that Booker himself assaulted Sanders and a conclusion otherwise is mere speculation. Booker does not appear in the video after Sanders is brought to the ground and being attacked by Requenes and Gomez and there is insufficient evidence from which a rational fact-finder could conclude Booker was also assaulting Sanders at this time. (RR: vol. 4, p. 37-39, 55-56, 223, and State's Exhibit 14.) There was no evidence of Sanders's blood on Booker and no evidence of injuries to Sanders other than those shown being delivered by Requenes and Gomez on the video. (RR: vol. 4, p. 48; vol. 5, p. 22, 30-31, 39, 50, 56-57, 63.)

Nor was there sufficient evidence to prove Booker's guilt through the law of parties because there was insufficient evidence to prove that Booker encouraged one of the co-defendants to intentionally or knowingly cause Sanders's death or aided or encouraged one of the co-defendants to commit an act clearly dangerous to human life. *See* TEX. PENAL CODE § 7.02(a) (2023). There was thus insufficient evidence of an understanding between the co-defendants or a common scheme. *See Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012).

Additionally, Booker would argue that the trial court erred in failing to give the jury an instruction on self-defense. A defendant is entitled to an instruction on self-defense when the issue is raised through the evidence, even if that evidence is weak or contradicted. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017). Here, the evidence showed that Booker had a reasonable belief that he had the right to defend himself from apparent danger because the evidence showed that Requenes told the co-defendants that Sanders was going to get a gun. (RR: vol. 5, p. 95, 96-97, 103, and 121). The trial court's failure to provide a self-defense instruction harmed Booker because without such a defense, the jury could not consider that Booker believed his actions were necessary to prevent Sanders from obtaining a gun.

Finally, Booker would argue that he received ineffective assistance of counsel at trial. The performance of his trial counsel John Powell "fell below an objective standard of reasonableness" and but for these errors, "the results of the proceeding would have been different." *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999).

Powell committed unprofessional error by failing to prepare his witness Requenes prior to trial. (RR: vol. Supp. 1, p. 21, 27, and 30.)

Booker's defense depended, in part, on a claim of self-defense, and Requenes statement to the co-defendants at the time of the offense that Sanders was going to get a gun was crucial to that defense. (RR: vol. Supp. 1, p. 28, 31, and 34.) However, Powell was unable to effectively elicit such testimony from Requenes at trial, and no self-defense instruction was given, harming Booker. (RR: vol. 5, p. 95, 96, 97, 117, 118, 119, 122, and 123.)

Additionally, Booker would argue that Powell committed unprofessional error by telling the jury at punishment that Booker would likely serve only half of the time the jury sentenced him to. (RR: vol. 8, p. 25.) This error harmed Booker by effectively asking the jury to hand down a sentence to Booker that was double what they thought he should serve.

Next, Booker would argue that Powell erred by failing to request a jury instruction on sudden passion. Like an instruction for self-defense, a defendant is entitled to an instruction on sudden passion when "there is some evidence to support it, even if that evidence is weak, impeached, contradicted, or unbelievable." *Trevino v. State*, 100 S.W.3d 232, 238 (Tex. Crim. App. 2003). Here, there was some evidence showing that Booker acted under the immediate influence of rage or anger after he

learned that Sanders had sexually assaulted his sister May, that his actions were induced by this provocation, that he acted before he regained the capacity for cool reflection, and there was a causal connection between the provocation, Booker's anger, and his actions leading up to Sanders's death. *See Wooten v. State*, 400 S.W.3d 601, 605 (Tex. Crim. App. 2013). (RR: vol. 3, p. 83; vol. 4, p. 21, 24, and 30; vol. 5, p. 68-69 and 78.) Booker was harmed by the failure to give this instruction because his sentence exceeded the maximum punishment that could have been given if the jury had found he had acted in sudden passion. (CR: 445.) TEX. PENAL CODE § 12.33(a) and § 19.02(d).

Lastly, Powell committed unprofessional error by failing to watch the videos provided to him in discovery. (RR: vol. 4, p. 201-03; vol. 7, p. 114.) There can be no valid trial strategy in failing to go through discovery provided by the State. Booker would argue that the harm from this error and the other errors identified above lies in their cumulative effect. *See Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988). The series of errors in Powell's performance, when viewed against the weight of the evidence against him, undermines any confidence one can have in the result of the trial.

ARGUMENT

i. Under any theory of the case, the evidence was insufficient evidence to convict Booker

To support a conviction upon appeal, every element of an offense must be proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979). Evidence will be insufficient to support the conviction if "considering all the record evidence in the light most favorable to the verdict, no rational fact-finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt." *Bearnth*, 361 S.W.3d at 138. Evidence fails to meet this standard when "(1) the record contains no evidence, or merely a 'modicum' of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt." *Id.*

Booker was found guilty of murder as alleged in the indictment. (CR: 433.) The indictment alleged that Booker either "intentionally or knowingly caused the death" of Sanders or "with intent to cause serious bodily injury [did] commit an act clearly dangerous to human life that caused the death" of Sanders. (CR: 10.) *See* TEX. PENAL CODE § 19.02(b). A defendant may be found guilty "as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he

is criminally responsible, or by both." *Id.* at § 7.01(a). The indictment did not need to charge Booker under the law of parties. *See Marable v. State*, 85 S.W.3d 287, 287 (Tex. Crim. App. 2002) (holding that "it is well-settled that the law of parties need not be pled in the indictment.") Thus, as explained at trial, the State could obtain a conviction in four ways:

> [by Ms. Kirst] We can prove that he intended to cause the death or that he intended to cause serious bodily injury, and you can read right there, "And committed an act clearly dangerous to human life." We can prove either of those. We do not have to prove both. Either.
>
> And in addition to that, we can prove both by the law of parties. We can prove that Mr. Booker aided, encouraged someone, [] to intentionally and knowingly cause the death of an individual. Or we can prove Mr. Booker aided, encouraged an individual, any of the co-Defendants, to commit an act clearly dangerous to human life. That's four ways, ladies and gentlemen, that we can prove murder.

(RR: vol. 5, p. 161.)

Booker would thus argue that the evidence was insufficient under any theory of the State's case.

a. <u>The evidence was insufficient evidence to prove that Booker committed murder as a principal</u>

As explained by Ms. Kirst in her closing argument and reiterated above, a person is guilty of murder if he, in relevant part, "(1) intentionally or knowingly causes the death of an individual [or] (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE § 19.02(b). Here, there was no evidence that Booker himself caused Sanders's death under either subsection of the statute.

Upon hearing the evidence, a jury may "draw reasonable inferences," but a jury may not "draw conclusions based on speculation." *Gross*, 380 S.W.3d at 188. The Court explained the difference between inferences and speculation. *Id.* An inference "consider[s] other facts and deduc[es] a logical consequence from them." *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007)). Speculation, however, is "the mere theorizing or guessing about the possible meaning of the facts and evidence presented." *Id.* It "is not sufficiently based upon facts or evidence" even if it "may not seem completely unreasonable." *Id.*

The Court has proposed a hypothetical to explain the difference:

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot

> the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation.

Hooper, 214 S.W.3d at 16.

In the present case, the video of the murder showed a group of men coming out of Diamond Jim's and at least one of them assaulting another. (RR: vol. 4, State's Exhibit 14.) Detective Gonzalez identified the men assaulting Sanders as Requenes and Gomez. (RR: vol. 4, p. 37-38 and 55-56.) The video showed Requenes hitting Sanders in the face. (RR: vol. 4, p. 38 and State's Exhibit 14.) After Sanders is hit, he falls, and his body can no longer be seen on the video. (RR: vol. 4, p. 38-39.) Aside from the portions of the video described by Detective Gonzalez, Booker and other co-defendants are off-screen for the relevant portion of the video. (RR: vol. 4, State's Exhibit 14.) As Detective Winstead testified, he could not see Booker in the video when Sanders is on the ground. (RR: vol. 4, p. 223.)

Thus, to prove Booker was a principal to the murder, the State's theory of the case requires the jury to believe that, off-screen, Booker attacked Sanders. However, there are insufficient facts from which the jury can make this inference.

In the hypothetical from *Hooper*, when the woman with the smoking gun is not the only person with a smoking gun in the room, it was not reasonable to infer her guilt. *See Hooper*, 214 S.W.3d at 16. Similarly, in the present case, it is not reasonable to infer Booker assaulted Sanders when there were so many people off-screen who may have participated in the assault. As evidence showed at trial:

> Q. [Ms. Kirst] So, any individuals on this portion of the screen could be still participating in the assault, correct?
>
> A. [Detective Gonzalez] Yes, ma'am.

(RR: vol. 4, p. 39.) Because the jury did not know who—if anyone—was hitting Sanders off screen, it was not reasonable to infer that Booker was attacking Sanders.

Though the State elicited some testimony that there had been blood and DNA on Booker's shoe, there was no evidence that blood—if it had even been blood on his shoe—came from assaulting Sanders and not from

stepping in Sanders's blood following the assault or that the substance was even human blood. (RR: vol. 5, p. 22, 30-31, and 39.) Sergeant James Patterson testified that there had been blood on the ground at the scene of the offense—RR: vol. 4, p. 175—meaning Booker could have stepped in it. Michelle Turner, a forensic scientist from the Texas Department of Public Safety's crime laboratory in Houston testified that the blood detected on Booker's shoe could have been a "false positive" or potentially animal blood. (RR: vol. 5, p. 30 and 39.) Moreover, concerning the DNA found on Booker's shoe, Sanders was "exclude[ed] with caution" and that there was only "a small chance that it could be a false exclusion and that really Danny Sanders could be a true donor to the profile" of the DNA found on Booker's shoe. (RR: vol. 5, p. 30-31.)

The conclusion about the evidence of the blood on his shoes is not contradicted by evidence of the presence of blood in the vehicle that Booker and the co-defendants drove away in. Requenes testified both that he does not recall who sat in the front or backseat of the vehicle when they left the scene of the crime and that it may have been the truth that Booker sat in the backseat if Requenes told that to the police during his interview. (RR: vol. 5, p. 107). His testimony was noncommittal at best.

Q. Which seat did Ashton get in?

A. I can't recall if he was in the front or in the back. I just know that—I mean, I'm pretty sure who rode with me was the ones that left with me.

Q. Okay. And what seat did Dayton get into?

A. Like I said, I can't recall whether or not they were in the front or in the back. So—

Q. Do you recall the statement you gave Detective Winstead?

A. No, ma'am.

Q. Do you recall giving a statement to Detective Winstead?

A. Yes, ma'am.

Q. If you told Detective Winstead in that statement that Dayton Booker got in the backseat, would that be the truth?

A. Maybe.

Q. So, is it your testimony here today that Dayton Booker got in the backseat?

A. Yes, ma'am, I guess so.

(RR: vol. 5, p. 107.) It cannot be said from the presence of blood by a seat Booker may or may not have sat in proves Booker's guilt of the offense beyond a reasonable doubt.

Moreover, as Detective Gonzalez testified, all of Sanders's injuries were to his "facial area." (RR: vol. 4, p. 48.) The Chief Medical Examiner Dr. Erin Barnhart reiterates this evidence:

> Q. All right. So, basically all of the injuries to the man were to his head and to his facial structure, correct?
>
> A. All the significant ones, yes.
>
> Q. And anything on his chest was, like, caused from CPR?
>
> A. Or potentially, yes.
>
> Q. And he didn't have any injuries, maybe a bruise–tiny bruise or something, all over the rest of his body, right?
>
> A. Correct.

(RR: vol. 5, p. 63.) She additionally testified that the injuries to his face and head caused Sanders's death. (RR: vol. 5, p. 56-57.) Nor was there evidence of blood on Sanders's clothes that would allow one to infer that he was struck on a part of his body other than his face, as Sanders's clothes had been disposed of at the hospital. (RR: vol. 4, p. 50.)

Thus, outside the frame of the video of the assault, there are undetermined people potentially doing unknown things to Sanders but leaving no evidence on his body from which the jury could reasonably

conclude that Sanders had been assaulted anywhere other than on his head and face. There was further no evidence on Booker from which one can conclude he assaulted Sanders outside the frame of the video and only a scintilla of evidence of where Booker sat. To convict Booker of having murdered Sanders as a principal, the jury would have to speculate that Sanders had been hit by Booker, despite no evidence on the video, no evidence of the assault on Sanders's body or clothes, no evidence on Booker's shoes supporting this theory, and only a scintilla of evidence of where he sat in the car. Such a conclusion is mere theorizing or guessing about the evidence that was presented by the State and not a logical consequence from the evidence. *See Gross*, 380 S.W.3d at 188. As such, this conclusion was based on impermissible speculation and cannot support Booker's conviction. *Id.*

Detective Gonzalez did testify, however, that the video shows Booker blocked Sanders in or knocked him to the ground. (RR: vol. 4, p. 65.) Such an act alone is not evidence that Booker intentionally or knowingly caused Sanders's death and was not intended to cause serious bodily injury or was so clearly dangerous to human life as required by the statute for a conviction of murder. *See* TEX. PENAL CODE § 19.02(b).

Therefore, this evidence is also no evidence or only a modicum of evidence of the elements of murder and insufficient to support Booker's conviction.

b. The evidence was insufficient evidence to prove Booker's guilt through the law of parties

A defendant is criminally responsible for the crimes of another if, in relevant part:

> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or

TEX. PENAL CODE § 7.02(a). Thus, as summed up by the State, under this theory, the State was required to prove that Booker "encouraged someone, [] to intentionally and knowingly cause the death of an individual. Or [that he] aided, encouraged an individual [] to commit an act clearly dangerous to human life." (RR: vol. 5, p. 161.) A defendant's mere presence during the offense or flight from the scene following the offense "is insufficient to sustain a conviction of one as a party to the offense." *Gross*, 380 S.W.3d at 186. Nor can post-offense conduct, though relevant, support a conviction alone. *Id.* at 188. "There must also be

sufficient evidence of an understanding or common scheme to commit a crime." *Id.*

In *Villanueva v. State*, the appellate court determined that there was enough evidence to convict the defendant of murder as a party to the offense when the evidence showed the appellant directed the disposal of the body following the offense. *Villanueva v. State*, No. 04-22-00086-CR (Tex. App.—San Antonio Jun 28, 2023, no pet.) (not designated for publication). In a horrific sequence of events, the evidence there showed that the defendant became angered with the victim, told the victim to leave the defendant's property, and "punched [the victim] with sufficient force that [the victim] was immediately knocked to the ground." *Id.* The two co-defendants then continued to assault the victim until he lost consciousness. *Id.* Notably, "[a]s the attack continued, [the defendant] had to be restrained from further participation." *Id.*

Not wanting to leave the victim in front of his own house, the appellant, along with his co-defendants, placed their unconscious victim in the back seat of the victim's own car "wedged face-down on the floor in the backseat—his head pushed under the front seat and his left shoulder lodged under the back seat," where he died of asphyxiation. *Id.* Evidence

showed the appellant then directed the abandonment of their victim and his vehicle and arranged for a ride after the offense for at least one of the co-defendants. *Id.*

On appeal, the appellant argued that the evidence was insufficient to support his conviction as a party to the offense. *Id.* "Focusing on the fact that he hit [the victim] only once, [the defendant] place[d] great weight on the medical examiner's conclusion that [the victim] did not die from being hit and kicked." *Id.* The appellate court found the evidence to be sufficient, noting that but for the attack that rendered the victim unconscious, the appellant and his co-defendants could not have crammed the victim into the back seat of the car, where he died of asphyxiation. *Id.* Additionally, the court noted that the appellant "did not attempt to stop the attack on [the victim]—rather, some evidence indicated he would have further participated in the attack were he not physically restrained" as well as noting that the appellant did not call 911 or seek aid for the victim. *Id.* Instead, evidence showed that the appellant:

> (1) solicited the group to return to his home to dispose of [the victim's] body [];

> (2) maintained a motive to remove [the victim's] body from his own yard;
>
> (3) directed [the] disposal of [the victim's] body; and
>
> (4) directed [the driver] where to pick up [a co-defendant] after [a co-defendant] disposed of [the victim's] body.

Id. Thus, when looking at the totality of the circumstances and "the cumulative effect of these facts," the court determined that a rational juror could infer that the appellant "intended to and did promote or assist in the disposal of [the victim's] body in a manner that resulted in his death." *Id.*

Similarly, in *Attwood v. State*, the evidence was found to be sufficient to support the defendant's conviction of murder as a party to the offense when the evidence showed that the defendant's "complicity went beyond mere presence at and flight from the scene of a crime." *Attwood v. State*, No. 13-15-00273-CR (Tex. App.—Corpus Christi Sep 29, 2016, pet. ref'd) (not designated for publication). There, the appellant and his friends picked up his sister-in-law and her cousin from a party because they were being treated badly by some of the other partygoers. *Id.* After picking the girls up, the appellant drove back to the party, and

his friends began arguing with some of the people who had allegedly treated the girls badly. *Id.* The argument escalated, and the appellant's friends began shooting at the partygoers. *Id.* The appellant—the driver of the vehicle—slowly pulled his van alongside the victim's car while his friends shot the victim four times, killing him on the scene. *Id.* At trial, the cousin testified that the appellant "just told us that that's the type of things he does for us.'" *Id.*

The court found that the evidence against the appellant showed that the appellant "was not merely present for a murder; nor did he simply flee from the scene of a shooting." *Id.* Rather, the evidence showed that he was aware that he had been aware that there had been an argument and that his friend "was intent on finding the party" when the girls had been insulted. *Id.* The appellant drove to the party and deliberately "stationed his van in front of the place where the patrons had gathered" and "kept the van stationary while [his friends] opened fire on fleeing patrons." *Id.* He then "drove forward at a speed that was slow enough for [his friend] to discharge no less than four bullets into [the victim's] car as the vehicles crossed each other." *Id.* His statement that this is the sort of thing he does for his family was further evidence

to support his conviction. *Id.* The jury could have rationally found that the appellant "participated in a drive-by shooting in accordance with a prior or contemporaneous plan to assist his friends," and the judgment of the trial court was affirmed. *Id.*

By contrast, in *Gross*, the evidence was not sufficient to support the conviction of murder as a party to the offense because there was no evidence of a plan or an agreement to commit the murder or assistance, or encouragement of the offense despite the appellant's incriminating conduct after the murder. *Gross*, 380 S.W.3d 181. There, the defendant was driving his brother-in-law home from a nightclub when he got into a verbal altercation with the driver of another car. *Id.* at 183. The defendant and the driver of the other vehicle exited their vehicles and were still arguing when the brother-in-law grabbed a shotgun in the back of the appellant's vehicle and shot the other driver. *Id.* The appellant drove off. *Id.* He was later interviewed by police and denied involvement. *Id.* The appellant was then charged and found guilty of murder as a party. *Id.*

The appellate court held that there was no evidence of a "prior or contemporaneous plan to shoot the victim, and 'any conclusion to the

contrary' would be based on mere speculation," and the Court of Criminal Appeals agreed. *Id.* at 186. Even if the face of the incriminating circumstantial evidence—that the appellant, as the getaway driver, fled from the scene, that he got into a fight with the victim, that he was in possession of the weapon, and that he lied to the police—the Court found the evidence to be insufficient to support his conviction. *Id.* Specifically, the Court noted "the evidence does not indicate that [the appellant] anticipated that [his brother-in-law] would shoot [the victim]." *Id.* Further, "there is no evidence that he assisted or encouraged [his brother-in-law] to kill [the victim]." *Id.* Finally, the Court remarked that when a defendant is involved in a fight with a victim and another party escalates the fight by shooting the victim, "the very least that is required is encouragement of the commission of the offense by words or by agreement made prior to or contemporaneous with the act." *Id.* (quoting *Randolph v. State*, 656 S.W.2d 475, 477 (Tex. Crim. App. 1983)).

Here, Booker would argue that the evidence does not show—by the standard of beyond a reasonable doubt—that he encouraged another to intentionally and knowingly kill Sanders or aided and encouraged another to commit an act clearly dangerous to human life. Booker would

argue that the facts of his case are more similar to the facts of *Gross* than to those of *Villanueva* or *Attwood*. First, Booker would argue that the evidence conclusively establishes a reasonable doubt concerning Booker's participation in the attack of Sanders. Though Detective Gonzalez testified that the video showed Booker "grab[bing] [Sanders] and throw[ing] him down to the ground," the video itself is too unclear to make out who it is who knocks Sanders to the ground to the standard of beyond a reasonable doubt. (RR: vol. 4, p. 65 and State's Exhibit 14.)

Even if this Court believes Detective Gonzalez's interpretation of the video, the evidence is still insufficient to show a plan or an agreement to commit the murder or assistance, or encouragement of the offense to support his conviction of murder as a party. Like all three defendants in *Gross*, *Villanueva*, and *Attwood*, Booker was angry at Sanders prior to the assault. However, unlike the defendant in *Villanueva*, there was no evidence that Booker had to be restrained from further assaulting Sanders, even accepting Gonzalez's testimony that he knocked Sanders to the ground. Rather, Booker himself does not even appear in the video during the assault of Sanders after Sanders is taken to the ground. (RR:

vol. 4, p. 223; vol. 5, p. 82-83.) Thus any conclusion that Booker had to be restrained would be pure speculation.

Additionally, unlike the defendant in *Villaneuva*, there was no evidence that Booker attempted to dispose of Sanders's body or placed Sanders in a position that would cause his death beyond the allegation that he knocked Sanders over. *See Villaneuva*, No. 04-22-00086-CR. Unlike the defendant in *Attwood*, there was no evidence that Booker led the co-defendants to Sanders. *See Attwood*, No. 13-15-00273-CR. Nor did the State put on evidence that Booker made incriminating statements to or about May and the things he would do for his family despite the State having the opportunity to examine May. *See id.*

Rather, Booker would argue that, like the defendant in *Gross*, there was no evidence of a plan or agreement to murder Sanders or evidence that Booker had encouraged or assisted one of the co-defendants in the assault. *See Gross*, 380 S.W.3d 181. Like the defendant in *Gross*, Booker had reason to be angry at Sanders and was untruthful to the police about his involvement in the offence. *See id.* However, Booker would argue that because the State failed to put on any evidence of encouragement or assistance from Sanders after the assault escalated, evidence of a plan

among the co-defendants to murder Sanders, or evidence of any act by Booker other than seeking to prevent Sanders from getting to his car, the evidence was insufficient to support his conviction of murder as a party to the offense.

ii. The trial court erred by failing to give the jury an instruction on self-defense

Under the Texas Penal Code, use of force against a person is justified "when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." TEX. PENAL CODE § 9.31(a). To be entitled to a jury instruction on self-defense, a defendant must raise the issue through the evidence, "whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense." *Gamino,* 537 S.W.3d at 510 (quoting *Elizondo v. State*, 487 S.W.3d 185, 197 (Tex. Crim. App. 2016)). A trial court's denial of the instruction will be reviewed "in the light most favorable to the defendant's requested submission." *Id.*

a. Booker had a reasonable belief that force was necessary to prevent Sanders from getting a gun

A reasonable belief is defined by the Penal Code as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." TEX. PENAL CODE § 1.07(a)(42). Actual danger is not required. *See Dugar v. State*, 464 S.W.3d 811, 817 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). "A person has the right to defend himself from apparent danger to the same extent as he would if the danger were real." *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996).

Hamel concerned the aggravated assault of the appellant's sister's boyfriend in what the appellant believed was defense of himself or others. *Id.* at 492. The sister and her boyfriend had a relationship plagued with physical violence, and after one violent episode, the appellant and his father went to the sister's house to help her pack. *Id.* Evidence showed that she told her family "to be very careful because [the victim] was carrying a gun in the car." *Id.*

The victim came to the house while the appellant and his father were packing and asked for the sister "in an angry, threatening tone." *Id.* The victim then threatened to shoot the appellant's father and "started

to go out the front door." *Id.* Believing the victim was going to get his gun from his car, the appellant stabbed the victim in his stomach. *Id.*

In determining whether the appellant was entitled to a jury instruction on self-defense, and whether the trial court's denial of such an instruction was in error, the Court noted that "it is not necessary that a jury find that the deceased was using or attempting to use unlawful deadly force against a defendant in order for the defendant's right of self-defense to exist." *Id.* 493. As long as the defendant has a reasonable belief in a danger to himself, he is entitled to an instruction on the defense. *Id.*

A reasonable belief "encompasses the traditional holding that a suspect is justified in defending against danger as he reasonably apprehends it." *Id.* The appellant's testimony that he believed the victim was headed to his car to get a gun to make good on his threat was evidence that the appellant believed force was necessary to protect himself against the victim's own use of force and, given the circumstances, reasonable. *Id.* Further, the Court noted a defendant "has the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted,

and regardless of what the trial court may or may not think about the credibility of the defense." *Id.*

In the present case, there was some evidence that Requenes told the other defendants that Sanders was going to get a gun.

> Q.[] And in that video that they have of you being interrogated, you told Mr. Winstead that [] he was going to get a gun. Do you remember that?
>
> A. Yes, sir.

(RR: vol. 5, p. 95.)

> Q. All right. Do you remember saying when you were leaving, "Hey, he's going to get a gun"?
>
> []
>
> A. [] If I recall correctly, yes, sir.

(RR: vol. 5, p. 96-97.)

> Q. And at that point you told Detective Winstead that maybe he had a gun or something, right?
>
> A. Yes, ma'am.

(RR: vol. 5, p. 103.)

> A. [] Yes, sir. I remember telling Detective Winstead that I was under the impression that he may be trying to go and get a weapon from his vehicle.

(RR: vol. 5, p. 121.)

At trial, Requenes never recanted saying this at the time of the offense but does admit that no gun was found.

> Q. But then when you testified, you told the jury on your case that you lied, right? There was no gun?
>
> A. I didn't say that I lied, but that there was no weapon.

(RR: vol. 5, p. 103-04.) He also admitted that Sanders himself did not say that he was going to get a gun. (RR: vol. 5, p. 115.)

Requenes' testimony that, upon leaving the bar, he had stated Sanders was going to get a gun is some evidence of a reasonable belief held by Booker that Sanders was going to resort to force and that force would be necessary to prevent Sanders from going to his car to protect himself from that force. Requenes's theory that Sanders was going to get a gun was corroborated by the fact that Sanders walked out of the bar without his wife Tammie, leaving her with the angry crowd when he went to his vehicle. (RR: vol. 3, p. 41; vol. 4, p. 33, State's Exhibit 14.) The evidence of what Requenes said as the men were leaving the bar was not contradicted by evidence that no gun had been found or evidence that Sanders never said he was going to get a gun. What Requenes said is

therefore some evidence of Booker's belief and entitled him to an instruction on self-defense.

b. The trial court's denial of Booker's request for a jury instruction on self-defense was harmful error

Booker would further argue that the trial court's error in denying a jury instruction on self-defense was harmful error. When a defendant objects to at trial, "he will obtain relief if the record shows that he suffered 'some harm.'" *Dugar*, 464 S.W.3d at 820 (quoting *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2016)). A reviewing court will consider:

> (1) the jury charge as a whole,
>
> (2) the arguments of counsel,
>
> (3) the entirety of the evidence, and
>
> (4) any other information that is relevant and contained within the record.

Id.

In *Dugar*, the court considered whether the trial court's failure to give an instruction on self-defense harmed the defendant. *Id.* There, evidence showed that the appellant felt threatened by a "vicious" and "ferocious" crowd and fired his gun two or three times above the crowd. *Id.* at 814-15. The appellant was denied a self-defense instruction at trial,

and, in evaluating harm, this Court considered that the appellant's entire defense centered around self-defense. *Id.* at 821. Because the appellant admitted he committed the *actus reus*, without a self-defense instruction, the appellant's only defense was that he did not act with the requisite *mens rea*. *Id.* Though he argued that he only attempted to scare the crowd, this Court noted:

> [t]hese arguments provided no answer to the portion of the charge that asked the more general question of whether appellant intentionally or knowingly "discharg[ed] a firearm at or in the direction of" the complainant, a fact which was conclusively established by appellant's own testimony. The only answer that appellant could have provided to that portion of the charge was a justification defense, but in this case, none was allowed.

Id. Without a self-defense instruction, conviction became "a virtual inevitability." *Id.* at 822.

Like the scenario in *Dugar*, a self-defense instruction would address the elements of the offense that would virtually inevitably lead to Booker's conviction without such a defense. Here, it was undisputed that Booker was present at the scene of the offense, left the bar after Sanders, and that something caused him to run and catch up with Sanders and

block him from entering his car. (RR: vol. 4, p. 36, 44, 57, and 215; vol. 5, p. 95 and 97.)

Without requiring Booker to take the stand himself and testify, there was no way for Booker to put on evidence addressing the element of *mens rea* other than through evidence from Requenes concerning what he had said at the scene of the offense about Sanders's gun and an instruction to the jury explaining how Booker's reasonable belief in Requenes's statement would justify Booker's actions. However, because no self-defense instruction was given, as the State noted in its closing argument, the jury was prohibited from considering whether Booker believed his actions were necessary and legally justified despite the evidence from Requenes that concerning self-defense. (RR: vol. 5, p. 162.) As such, Booker was harmed by the trial court's denial of his request for a jury instruction on self-defense.

iii. Booker received ineffective assistance of counsel

The right to counsel under the United States Constitution and the Texas Constitution means the right to effective assistance. *See generally Strickland v. Washington*, 466 U.S. 668, 686 (1984) *and Thompson*, 9 S.W.3d at 812. A defendant's right is violated when his lawyer's

performance "fell below an objective standard of reasonableness" and when "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thompson*, 9 S.W.3d at 812. *See also Strickland*, 466 U.S. at 687.

To overcome the first prong of the *Strickland* test, an appellant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The second prong of the test asks "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In evaluating this prong, a court "must consider the totality of the evidence before the judge or jury." *Id.* The Court cautioned that:

> [s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Id. at 695-96.

In the present case, trial counsel for Booker made multiple unprofessional errors throughout the course of Booker's trial. These errors undermined the confidence one can have in the jury verdict.

a. Powell committed a harmful unprofessional error by failing to prepare his witness Requenes to testify at trial because, by failing to properly prepare Requenes, Powell was unable to put on sufficient evidence to entitle Booker to a self-defense instruction.

Booker's defense depended in large part on a self-defense claim that he believed that Sanders was going to get a gun from his car. (RR: vol. Supp. 1, p. 31 and 34.) In support of Booker's self-defense claim, Booker's trial attorney Powell called Booker's co-defendant Requenes as a witness for the defense. (RR: vol. 5, p. 93-122.)

Requenes, when he was previously represented by Powell, told Powell that he had announced at the bar that Sanders was going to get a gun. (RR: vol. Supp. 1, p. 24-25 and 26.) At the hearing on the motion for a new trial, Powell testified that "I think that [Requenes's] testimony should have helped because of him saying in effect the man is going to get a gun." (RR: vol. Supp. 1, p. 28.)

However, at Booker's trial, Powell was unable to get Requenes to testify clearly that he had said that Sanders had a gun and that telling

others that he had a gun is what motivated the others to run out of the bar sufficient to warrant a self-defense instruction. Requenes's testimony was noncommittal, and though Powell tried many times to elicit testimony to this effect or to help Booker's case, his questions were objected to for leading the witness. (RR: vol. 5, p. 95, 96, 97, 117, 118, 119, 122, and 123.) After several leading questions, the trial judge eventually had to admonish or educate Powell about asking leading questions:

> THE COURT: [] So, what we're talking about Mr. Powell is ask questions that do not suggest the answer. Do you understand what I'm saying?
>
> MR. POWELL: Yes, sir.
>
> THE COURT: Okay. That was a leading question. Do not ask leading questions.

(RR: vol. 5, p. 119-20.)

Despite the fact that Requenes's testimony that he had said that Sanders was going to get a gun was so critical to Booker's defense, Powell did not speak with Requenes prior to Booker's trial to prepare him to testify. (RR: vol. Supp. 1, p. 21, 27, and 30.) Powell was unable to get helpful testimony from Requenes without asking leading questions, which he likely would not have been forced to try if Powell had interviewed and prepared his witness before trial. Powell testified that if

he had to do it all over again, "I might have asked [Requenes's lawyer] to be able to talk with Requenes. However, I would still want Requenes to reiterate what he's told us about the man going to get a gun." (RR: vol. Supp. 1, p. 30.) Powell admitted that Requenes's testimony did not achieve this. (RR: vol. Supp. 1, p. 30.)

There was no other evidence put on to support this theory, and Powell admitted he "[hadn't] thought about" whether he had "anything else that [he] could put on in defense or anything that [he] could kind of feather this self-defense claims." (RR: vol. Supp. 1, p. 36-38.) He seemed to think his opening statement was strong enough that he did not need another witness to support the self-defense theory:

> Q. I was looking at some of your questioning of the other witnesses. I didn't see you ask one other witness if they heard somebody say, "He's got a gun."
>
> A. You didn't look at the opening statement then.

(RR: vol. Supp. 1, p. 37.) An opening statement is not evidence, and Powell committed an unprofessional error by relying on his opening statement to persuade the jury rather than the evidence.

Though Booker argued above that the trial court erred in denying his request for a self-defense instruction, Booker would argue in the

alternative that he received ineffective assistance of counsel that harmed him by causing his request for a self-defense instruction to be denied. If Requenes had provided clearer and more definitive testimony concerning what he had told the co-defendants about Sanders getting a gun, Booker would have been able to rely on the defense of self-defense. A defendant is entitled to a jury instruction on self-defense if there is some evidence that the defendant had a reasonable belief that force was needed to protect himself, "whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense." *Gamino*, 537 S.W.3d at 510 (quoting *Elizondo*, 487 S.W.3d at 197). That Powell was not able to get Requenes testimony to meet this low threshold to be entitled to a self-defense instruction shows that Powell's ineffective assistance harmed Booker.

b. <u>At the punishment phase of the trial, Powell told the jury that Booker would only serve half of the time he was sentenced to, harming Booker by effectively asking the jury to sentence Booker to twice what they thought he deserved.</u>

In his closing argument, Powell asked the jury to sentence Booker to five years incarceration but made it clear that if Booker would be

sentenced to five years, "he's probably going to get out in two and a half years." (RR: vol. 8, p. 25.) He argued:

> [s]o, what is the proper punishment for him? Five years. I think that will do it. I don't think there is any kind of reason to go above the two and a half years that he'll have to serve. I think that will do it.

(RR: vol. 8, p 25.) His argument thus led the jury to believe that whatever they sentence Booker to, he will likely only serve half of that time.

At the hearing on the motion for a new trial, he explained this strategy by saying:

> my feeling at the time was that we were going to get a verdict and they were going to give him at least the minimum, but that they would not go over ten. So, if you go ten, that's five. If you go five, that's two and a half.

(RR: vol. Supp. 1, p. 52-53.) He continued:

> if you use the illustrations of the other witnesses getting light sentences and them getting out in two and a half years or so on five years, then the hope was that they would see that it's potentially possible for Dayton Booker to straighten himself out in the minimum amount of time because there's no way they were not going to, on the basis of them having found him guilty, then punish him at least five years.

(RR: vol. Supp. 1, p. 54.) However, his strategy was not even a valid statement of the law. *See generally* TEX. GOV'T CODE § 508.141 *et seq.* (2023) (explaining release for parole and mandatory supervision).

Though Powell argued at the hearing that he meant to convey to the jury that a person could be reformed after only a short period of time in prison, the logical conclusion of his argument can be nothing other than the jury should double whatever time they thought was needed to reform Booker in order to make sure he is in prison for that complete period, whether it be two and a half years, five years, or fifteen years. There was no need to tell the jury that sometimes a prisoner may be released early if his argument was that even a short amount of time may reform a person. Powell failed to explain how his argument that the jury's sentence would be halved would not lead jurors to the obvious conclusion that they should double his sentence. This error therefore harmed Booker by effectively asking the jury to double his sentence.

c. Powell committed unprofessional error by failing to ask for a jury instruction on sudden passion, harming Booker by preventing this jury instruction

Sudden passion is "passion directly caused by and arising out of provocation by the individual killed or another acting with the person

killed which passion arises at the time of the offense and is not solely the result of former provocation." TEX. PENAL CODE § 19.02(a)(2). For the purposes of sentencing, if a defendant proves sudden passion by a preponderance of the evidence, "the offense is a felony of the second degree" rather than a first degree. *Id.* at § 19.02(d). Thus, if sudden passion is proved, the punishment term must be between 2 and 20 years imprisonment opposed to a term of life or 5 to 99 years in the case of a first degree felony. *Id.* at § 12.32(a) and § 12.33(a).

Like self-defense, a defendant is entitled to receive an instruction on sudden passion when "there is some evidence to support it, even if that evidence is weak, impeached, contradicted, or unbelievable." *Trevino*, 100 S.W.3d at 238. The evidence must show:

> 1) that the defendant in fact acted under the immediate influence of a passion such as terror, anger, rage, or resentment;
>
> 2) that his sudden passion was in fact induced by some provocation by the deceased or another acting with him, which provocation would commonly produce such a passion in a person of ordinary temper;
>
> 3) that he committed the murder before regaining his capacity for cool reflection; and

> 4) that a causal connection existed "between the provocation, passion, and homicide."

Wooten, 400 S.W.3d at 605.

A defendant need only prove he acted in sudden passion by a preponderance of the evidence. TEX. PENAL CODE § 19.02(d). Further, "the jurors must agree that the defendant either did or did not act under the immediate influence of sudden passion arising from an adequate cause." *Newton v. State*, 168 S.W.3d 255, 256 (Tex. App.—Austin 2005, pet. ref'd). A mistrial will result if the jurors do not agree. *Id.*

Here, the evidence was uncontested that the assault was induced by Booker and the co-defendants learning that Booker's half-sister May had been sexually assaulted by Sanders several years ago. (RR: vol. 3, p. 83; vol. 4, p. 21, 24, and 30; vol. 5, p. 68-69 and 78.) May saw Sanders at the bar, and Sanders "said that he'd seen pictures of [May's little sister] recently and that she looked good." (RR: vol. 5, p. 73.) This interaction and seeing Sanders at the bar had upset May, and she told Booker and the others that Sanders had sexually assaulted her as a child. (RR: vol. 5, p. 78 and 87.) Booker and others tried to comfort her, and Booker himself appeared to have been hugged by someone who "[s]eems like she is trying to console him." RR: vol. 4, p. 21. (RR: vol. 5, p. 69, 78, and 87.)

Further, as the State argued in its closing, "Dayton had the motive. His sister is the one who's distraught in the bar. That's his sister. Who would be angrier in this group of people beside her brother? Who?" (RR: vol. 5, p. 169.) The State thus admitted that Booker acted under the influence of anger induced by the actions of Sanders and that there was a causal connection between Sanders's actions, Booker's anger, and the subsequent murder. *See Wooten*, 400 S.W.3d at 605 (listing the element of sudden passion).

The State, however, argued that because an hour and six minutes passed between the time May told Booker of her past sexual assault by Sanders and the assault on Sanders, there was "plenty of time for cool reflection." (RR: vol. Supp. 1, p. 9.) However, Counsel for Booker could find no case law stating when a sudden passion defense would expire. *See generally Swearingen v. State*, 270 S.W.3d 804 (Tex. App.—Austin 2008, pet. ref'd) (a sudden passion instruction had been given when evidence showed that the defendant and his victim had been arguing over the course of two days); *Harris v. State*, 152 S.W.3d 786 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (a sudden passion instruction had been given when evidence showed that the defendant waited an unspecified amount

of time for the victim and his paramour to exit a hotel); *and Figueroa v. State*, No. 01-22-00179-CR (Tex. App.—Houston [1st Dist.] June 15, 2023, no pet.) (not designated for publication) (a sudden passion instruction had been given when the victim was shot more than three hours after the defendant learned about an affair between the victim and the defendant's wife). The requirement is rather before the defendant "regain[s] his capacity for cool reflection." *Wooten*, 400 S.W.3d at 605.

In *Swearingen*, the evidence showed the defendant getting angry, calming down, and getting angry again over the course of at least 24 hours before the murder was committed, and a sudden passion instruction had been given, though the theory was rejected by the jury. *Swearingen*, 270 S.W.3d 804. In his statement to the police, the appellant said that he and his wife argued on and off for hours on a Friday afternoon. *Id.* at 816. She confessed to sleeping with another man, and the defendant left the home for a bar and returned that night at around 11:00. *Id.* They resumed arguing, then he left again to spend the night at a cousin's house. *Id.*

Saturday afternoon, he returned home, and the couple argued again. *Id.* at 816-17. Eventually, the wife attacked the appellant while he

held their daughter. *Id.* at 817. He described setting his daughter down then attacking his wife. *Id.* He stated that "he did not realize [] that his hands had wound up around her neck." *Id.* After killing his wife, the appellant "threw her" body into the bathtub because he didn't want blood to get on the carpet. *Id.* at 817-18. He then put a trash bag over her head and a blanket on the floor of the trunk of her car to keep the car from getting wet with blood and water and the next day abandoned her car in a neighboring county. *Id.* at 815.

On cross-examination of the appellant, the prosecutor focused on "the passage of time and [the appellant's] deliberative acts between the events that supposedly caused him to lose control and when he attacked [his wife]," such as disconnecting her computer and breaking her phone so she would be unable to call for help. *Id.* at 818. The prosecutor further elicited testimony that the appellant "had enough presence of mind to put [the appellant's] daughter down before attacking [his] wife" because he did not want to injure the daughter. *Id.* at 819. Evidence also showed that the appellant had "a running joke" about killing his wife. *Id.*

The court held that the appellant's "calculated acts belie [the appellant] being incapable of rational thought or self-control." *Id.* 820.

Additionally, the appellant admitted "that, prior to their final argument, he already knew of the facts that allegedly caused him to lose control—including the nature and extent of [his wife's] ongoing infidelity." *Id.* His "deliberative acts" and the fact that he knew about his wife's affair before the argument undermines the argument that he was acting under the immediate influence of anger or rage as would be required to show sudden passion. *Id. See also Wooten*, 400 S.W.3d at 605. Thus, even though the appellate court determined that the jury rightfully found there had been no sudden passion, the evidence was still sufficient to warrant the instruction. *Id.*

By contrast, here is there is no indication that Booker was calm and capable of cool reflection. At the hearing on the motion for a new trial, the State argues that for an hour and six minutes, Booker was "taking shots, playing pool, talking to the man who sexually assaulted his sister after he learned about the fact that he sexually assaulted his sister." (RR: vol. Supp. 1, p. 96.) However, according to Detective Gonzalez's description of the surveillance video, Booker is not playing pool with the co-defendants or Sanders. (RR: vol. 4, p. 27-29 and State's Exhibit 12.) As Detective Gonzalez testified:

> Q. So, now we've got Ashton and Taylor and then up top we have Chris Gomez, correct?
>
> A. Yes, ma'am.
>
> Q. And Antonio Figueroa?
>
> A. Correct.
>
> Q. Those are four of the five that are charged in this case, correct?
>
> A. Correct.
>
> Q. Now, for the first few minutes everyone appears to just play pool?
>
> A. Correct.
>
> Q. Does there appear to be any sort of issues?
>
> A. Not as they're playing pool.

(RR: vol. 4, p. 29 and State's Exhibit 12.)

What was missing in this description, however, was Booker himself. Detective Gonzalez described him as sitting at a table and being hugged and consoled by another patron. (RR: vol. 4, p. 21 and State's Exhibit 12.) This description belies Detective Gonzalez's earlier observation that no one seemed upset. (RR: vol. 4, p. 19 and State's Exhibit 12.)

The video also shows Ms. Figueroa confronting Sanders and being aggressive with him. (RR: vol. 4, p. 30, 43 and State's Exhibits 12 and 27.) Sanders then leaves with Ms. Figueroa, Requenes, and Coleman

following closely behind, and then Figueroa, Booker, and Gomez leave. (RR: vol. 4, p. 30-33 and State's Exhibit 12.)

Like the ongoing fighting in *Swearingen*, the additional outburst from Crystal shows that tempers had not cooled and that there had not been sufficient time for cool reflection. However, unlike the facts in *Swearingen*, here there is no evidence that Booker knew of the assault prior to the evening of the murder or of any deliberate or calculated acts before or after the offense that show Booker is capable of rational thought or self-control. To the contrary, he was seen needing consolation. (RR: vol. 4, p. 21 and State's Exhibit 12.)

Based on these facts, it is likely that the jury would have found that Booker acted under the immediate influence of sudden passion and thus reduced the offense to a second degree felony. TEX. PENAL CODE § 19.02(d). But without an instruction on sudden passion, Booker was sentenced to 29 years imprisonment. (CR: 445.) Had the jury found that Booker acted in sudden passion, the applicable range of punishment would have been only 2 to 20 years. *See id.* at § 12.33(a) and § 19.02(d). Thus because Booker's punishment exceeded the maximum sentence for

one who acted in sudden passion, Booker was harmed by trial counsel's failure to ask for this instruction.

d. It was unprofessional error to fail to watch the videos provided to Powell by the State in discovery and the cumulative effect of this error with the others undermines any confidence one can have in the outcome of the trial

During the guilt/innocence phase of the trial, it was revealed that Powell did not watch at least two of the videos provided to him by the State in discovery. The first was Booker's recorded statement to Detective Winstead, which had been given to Powell two years prior to trial. (RR: vol. 4, p. 201-03.) Despite not knowing what was in the video, Powell did not object to the video being played for the jury after a redaction. (RR: vol. 4, p. 208 and State's Exhibit 130.)

Later, in the punishment phase of trial, Powell admitted there was another video he had not watched. (RR: vol. 7, p. 114.) Powell attempted to object to the admission of the video.

> MR. POWELL: Objection, your Honor. I have no idea what's on there.
>
> MS. KIRST: Judge, all discovery has been turned over to the Defense.
>
> THE COURT: You're saying you haven't seen it or it's never been given to you?

> MR. POWELL: I have not seen that particular video, no. I don't know when they gave it to me. They gave me seven videos—
>
> THE COURT: Y'all come up real quick.
>
> (At the Bench)
>
> MS. KIRST: This video, Mr. Booker was arrested in August on this case. At that time we uploaded all discovery. So, it's on a Genetec file for Mr. Powell. That occurred in September of 2023. He has had this video since September of 2023.

(RR: vol. 7, p. 114-15.) Powell complained that going through discovery the State provide him was "like a needle in a haystack." (RR: vol. 7, p. 115.) When the trial judge offered to take a recess to allow Powell to watch the video, Powell refused the offer and switched tactics to saying that the witness "has no idea that that is actually the video" that the witness had just identified because he recognized that he had signed his initials to it and remembered having viewed it. (RR: vol. 7, p. 114 and 116-17.)

There can be no valid trial strategy in failing to prepare and watch the videos provided in discovery. *But see generally State v. Escobedo*, No. 13-16-00684-CR (Tex. App.—Corpus Christi Dec 19, 2018, no pet.) (not designated for publication) (holding that when an attorney "had no knowledge that the discovery existed" when the discovery had not been

turned over by the State, counsel's "performance would not have fallen below an objective standard of reasonableness.") Powell had knowledge that these videos existed but chose not to watch them for two years. (RR: vol. 4, p. 201-03.) He claimed searching through the discovery provided by the State was like looking for a needle in a haystack, yet even when the State identified one particular video it wanted to play, Powell still did not take the time to watch the video. (RR: vol. 7, p. 115 and 116-17.) As such, his performance fell below an objective standard of reasonableness.

Booker would argue that failing to prepare for trial by reviewing all discovery is the kind of error that has a "pervasive effect on the inferences to be drawn from the evidence" that Supreme Court warned about in *Strickland*. *Strickland*, 466 U.S. at 695-96. The harm of this error "lie[s] in the cumulative effect." *Stahl*, 749 S.W.2d at 832. *See also Thompson*, 9 S.W.3d at 813 (writing "[a]n appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel.") Thus, when looking at the totality of the representation, trial counsel's errors, and the weight of the evidence against Booker, Booker would argue that the numerous and

pervasive errors undermine any confidence one can have in the jury verdict.

PRAYER

Wherefore, premises considered, Appellant Dayton Andre Booker respectfully prays this Court determine that there was insufficient evidence to support his conviction, find that the trial court erred in denying his request for a jury instruction on self-defense, determine that he received ineffective assistance of counsel, reverse the judgment of the trial court, and for whatever further relief, in law or in equity, to which he has shown himself to be justly entitled.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of Appellant's Original Brief was served on all other parties or their attorneys of record on this 23rd day of October 2024 by certified mail, return receipt requested.

/s/ Tad Nelson
Tad Nelson
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Certificate of Compliance

I hereby certify that this brief is in compliance with Rule 9.4(i) of the Texas Rules of Appellate Procedure because its relevant portions contain 11,079 words.

/s/ Tad Nelson
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