No. 01-24-00720-CR
In the
COURT OF APPEALS
For the
FIRST JUDICIAL DISTRICT
At Houston

EX PARTE '

'

TODD MOFFAT '

APPEAL FROM THE COUNTY COURT AT LAW No. 4 OF FORT BEND COUNTY, TEXAS
TRIAL COURT NO. 16-CCR-186738

STATE'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

IDENTIFICATION OF PARTIES

Pursuant to Tex. R. App. P. 38.1, a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

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THE STATE OF TEXAS

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TODD MOFFAT

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IDENTIFICATION OF PARTIES (cont.)

Trial Judge:
The Hon. Toni Wallace
County Court at Law #4
Fort Bend County, Texas

TABLE OF CONTENTS

SECTION **PAGE**

INDEX OF AUTHORITIES

Cases

Statutes

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Tex. R. App. P. 39, the State does not request oral argument.

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STATEMENT OF THE CASE

On November 2, 2017, Appellee was convicted of the offense of assault, family violence, a class A misdemeanor, following a jury trial. (1CR42). The trial court assessed Appellee's punishment at 365 days in the Fort Bend County Jail, probated for 24 months, with a $2000 fine, based on agreement with the State. (1CR51). Appellee filed a motion for new trial, which was denied by the trial court. (1CR91). Appellee did not appeal this conviction.

On February 6, 2023, Appellee filed a post-conviction application for writ of habeas corpus under Articles 11.072 and 11.073 of the Code of Criminal Procedure. (1CR115). The trial court granted relief on Appellee's

application for a writ of habeas corpus. (4CR437). The State now appeals the trial court's grant of relief. (4CR455).

POINTS OF ERROR PRESENTED BY THE STATE

I. The trial court abused its discretion when it granted Appellee habeas relief on the grounds that he was convicted by false, material evidence, because the contravening evidence Appellee presented at the habeas hearing did nothing more than impeach the trial witnesses' credibility.

II. The trial court abused its discretion when it granted Appellee habeas relief on the grounds that he was actually innocent because the evidence Appellee presented at the habeas hearing did nothing more than contest the trial witnesses' credibility.

STATEMENT OF FACTS

Appellee was charged by information with the offense of family violence assault. (1CR8). The information alleged, in relevant part, that Appellant "did then and there intentionally, knowingly, or recklessly cause bodily injury to Rhonda Deem by striking her with his hand or hands and pushing her with his hand or hands." (1CR8).[1]

[1] The jury charge tracked the manner and means alleged in the information and thus authorized a conviction if the jury found that Appellee "did then and there intentionally, knowingly, or recklessly cause bodily injury to Rhonda Deem by striking her with his hand or hands and pushing her with his hand or hands." (1CR47).

The Trial Proceedings

A. The Assault

Appellee was married to Angela Moffat. (5RR at St. Ex. 9 at p. 7[2]). They lived together in Katy, Texas with their two young children. (5RR at St. Ex. 9 at pp. 7-8). On January 23, 2016, an argument broke out between Appellee and Angela in the kitchen—the latest conflict in a marriage rife with difficulties. (5RR at St. Ex. 9 at pp. 21-22). At the time, Angela's mother, Rhonda Deem, had been staying with the family, providing childcare for Appellee and Angela. (5RR at St. Ex. 9 at pp. 12-22).

That morning, Appellee was frustrated with Angela, feeling she wasn't enforcing the boundaries with Rhonda regarding the children. (5RR at St. Ex. 9 at pp. 14-20). Angela was also frustrated, feeling they had resolved Appellee's complaints regarding the children. (5RR at St. Ex. 9 at p. 20). Overhearing the argument, Rhonda walked into the kitchen, and Appellee and Rhonda exchanged insults. (5RR at St. Ex. 9 at pp. 21-23). Appellee told Rhonda to leave the house, threatening to call the police if she did not comply.

[2] References to page numbers in the Reporter's Record from Appellee's trial on the underlying offense refer to the page numbers from the original Reporter's Record, as opposed to the page numbers from the subsequent volume of the Reporter's Record of the habeas proceedings. The Reporter's Record from the underlying trial appear in several places in the habeas record, including as exhibits in Volume 5 of the habeas Reporter's Record, and that is the location to which the State points in its references here.

(5RR at St. Ex. 9 at pp. 23-24). Angela interjected, telling Appellee that Rhonda was her guest and would be staying. (5RR at St. Ex. 9 at p. 24).

As the argument intensified, Appellee picked up styrofoam cups full of soda and threw them at Angela, hitting her and their daughter. (5RR at St. Ex. 9 at p. 24, 76). The State introduced photographs showing the soda spills and Appellee's daughter's vomit. (5RR at St. Ex. 9; see also 1st Supp CR at App. Ex. "B" at p. CR20 (Def. Trial Ex. 2))[3]. Appellee then charged at Rhonda, using his chest to push her into a wall in the kitchen. (5RR at St. Ex. 9 at pp. 24-25, 76). As Appellee reached for a Yankee candle, Rhonda tried to stop him. (5RR at St. Ex. 9 at p. 77). Appellee reacted by striking Rhonda in the left jaw with his right hand. (5RR at St. Ex. 9 at p. 77). As Rhonda fell to the floor, Appellee grabbed the left side of her head and pushed her head into the wall. (5RR at St. Ex. 9 at pp. 79-81). The side of Rhonda's face struck the window sill and this caused her significant pain, and she still had a crease on the side of her face from where her face struck the window sill. (5RR at St. Ex. 9 at pp. 24-25, 76). Once Rhonda hit the floor, Appellee kicked Rhonda

[3] References to Appellee's habeas exhibits refer to their placement in the 1st Supplemental Clerk's Record, and by their Exhibit Letter (i.e."B") and, if they contain page numbers, by the page number within the exhibit firstly, and secondly by the Clerk's Record page number – the Clerk's Record page number being designated by a "CR" before the number, e.g., CR20. Where they were also trial exhibits, they include "trial" and a numeric designation to indicate which trial exhibit they were.

in her right shoulder. (5RR at St. Ex. 9 at pp. 25, 81). Appellee left the house, and Angela called 911 to report the assault. (5RR at St. Ex. 9 at pp. 26-27).

B. The Investigation

Deputy Ian Haydel of the Fort Bend County Sheriff's Office responded to Angela's 911 call and interviewed Angela and Rhonda. (5RR at St. Ex. 10 at pp. 20-21). Rhonda told Haydel that Appellee became angry and pushed her so that she fell against the kitchen wall, causing her to strike the right side of her head. (5RR at St. Ex. 10 at p. 27). Rhonda also stated that Appellee "struck the left side of her face with a closed fist causing her pain." Deputy Haydel took photos of Rhonda's injuries. In doing so, he observed "a slight amount of swelling" and "a slight raised reddish area" on the right side of Rhonda's face, near her cheekbone. (5RR at St. Ex. 10 at p. 28).

Deputy Haydel spoke with Appellee, who returned to the house while Haydel was still on the scene. (5RR at St. Ex. 10 at pp. 23-24). Appellee told Deputy Haydel that an argument occurred, but denied throwing anything or striking anyone. (5RR at St. Ex. 10 at p. 30). Deputy Haydel took photos of Appellee, including photos of his hands, which were introduced into evidence without objection. (5RR at St. Ex. 10 at pp. 32-33). Deputy Haydel ultimately left the home without making an arrest. (5RR at St. Ex. 10 at p. 33).

Rhonda refused medical treatment at the scene, but her pain increased throughout the day. That afternoon, she visited an emergency room, where she complained of throbbing pain on both sides of her face. (5RR"C" at p. 68 of 79).[4] The treating physician ordered a CT scan, which revealed a nondisplaced fracture (mandibular fracture) on Rhonda's left jaw. (5RR"C" at pp. 68-69 of 79).

The night of the assault, Rhonda took photos of the right side of her face, along with her right shoulder and back area, where Appellee kicked her. (State's Trial Exs. 9-10 App. Ex. I; 5RR"B" at pp.14-15 of 20).[5] The next day, Rhonda took photos of the right side of her face. (State's Trial Ex. 11 App. Ex. I; 5RR"B" at p.16 of 20). One week later, Rhonda took more photos of how her injuries progressed over time. (State's Trial Ex. 12-13 App. Ex. I; 5RR"B" at pp.18-19 of 20).[6]

Detective Don Worsham was the lead investigator in the case. (5RR at St. Ex. 10 at p. 54). He spoke with Rhonda and Angela, whose accounts about what happened were consistent with the offense report and evidence collected

[4] References to Volume 5C of the Reporter's Record refer to the page number as listed in the .pdf display of the document because the record is not internally paginated.
[5] References to Volume 5"B" of the Reporter's Record refer to the page number as listed in the .pdf display of the document because the record is not internally paginated.
[6] The photos Rhonda took of her injuries, which were admitted as State's Exhibits 9-13, are collectively referred to by those exhibit numbers, or as the "personal photos," as this is how they were often referred to by the parties during the habeas proceedings in the trial court.

at the scene, including the police photos of Rhonda. (5RR at St. Ex. 10 at pp. 55-56). Detective Worsham also reviewed the personal photos of Rhonda. (5RR at St. Ex. 10 at p. 57). He contacted Appellee for a statement, but Appellee requested to speak with his attorney before making a statement. (5RR at St. Ex. 10 at p. 56). After completing his investigation, Detective Worsham turned the case over to the District Attorney's Office, which accepted charges against Appellee for misdemeanor family violence assault. (5RR at St. Ex. 10 at p. 55).

C. The Prosecution

On April 28, 2016, the State filed an information against Appellee, alleging he "intentionally, knowingly, or recklessly cause[d] bodily injury to [Rhonda] by striking her with his hand or hands and pushing her with his hand or hands." (1CR7).

On October 31, 2017, Appellee pleaded not guilty and tried his case to a jury. (5RR at St. Ex. 9). The State presented testimony from Angela, Rhonda, and, Deputy Haydel and Detective Worsham of the Fort Bend County Sheriff's Office. (5RR at St. Exs. 9-10). The State offered several exhibits, including the police photos and personal photos of Rhonda. (State's Trial Ex. 12-13 App. Ex. I; 5RR"B" at pp.14-19 of 20). Notably, Appellee had access to the personal photos by May 2, 2017—about six months before trial. (5RR

at St. Ex. 11). Appellee presented no witnesses at trial, but offered exhibits, including one of the police photos of Rhonda. (1st Supp CR at App. Ex. "B" at p. CR20 (Def. Trial Ex. 2).

The State's witnesses detailed Rhonda's injuries following the assault. Rhonda testified that, after being assaulted, she felt "quite a bit" of pain, and her face started swelling. (5RR at St. Ex. 9 at p. 85). Angela testified "the swelling on [Rhonda's] face went from minor to almost a baseball size. It just happened very rapidly." (5RR at St. Ex. 9 at p. 33). Angela testified that after a day, the swelling on Rhonda's face started turning purple, and Rhonda had "a black eye, [and] bruises on her arms and shoulders," but "mostly her face." (5RR at St. Ex. 9 at pp. 33-34).

Deputy Haydel pointed the jury's attention to one of the police photos of Rhonda, in which he observed "a slight amount of swelling" and "a slight raised reddish area" on the right side of Rhonda's face, near her cheekbone. (5RR at St. Ex. 10 at p. 28). Detective Worsham testified about the personal photos of Rhonda, which he described as "consistent with what [he] reviewed by [Deputy Haydel]." (5RR at St. Ex. 10 at p. 59). When asked to describe the injuries shown in the photos, Deputy Worsham responded that he observed "bruising, mainly." (5RR at St. Ex. 10 at p. 59).

The jury also considered evidence that visible bruising is not the only indicator of an assault. Deputy Haydel testified that an assault may not result in visible injuries right away. (5RR at St. Ex. 10 at p. 29). On cross-examination, Detective Worsham was questioned about a supposed inconsistency in the personal photos of Rhonda, which show the right side of Rhonda's face when she testified to being struck on the left side of her face. (5RR at St. Ex. 10 at pp. 63-64). Detective Worsham responded,

> I can tell you that, in a domestic situation, things happen, boom, boom, boom. And we listen to those things and as far as the left side or the right side, originally when I got the case these were the only photos that I had an opportunity to look at. And there were photos depicting both the left and the right side. I do know in my experience, and by no means am I a medical doctor, that bruising start out light, and over the five-day period they become to a point of real darkness, and then they start to yellow around the edge and then slowly disseminate.
>
> As far as a bruise occurred this day, and it disseminated on this day, I cannot tell you how many days. I just know in my experience that a light bruise can turn into a dark bruise over matter of course, but I wasn't there.

(5RR at St. Ex. 10 at p. 64).

On November 2, 2017, the jury convicted Appellee of misdemeanor family violence assault. (1CR42). The trial court assessed Appellee's punishment at 365 days in the Fort Bend County Jail, probated for 24 months, with a $2000 fine, based on agreement with the State. (1CR51). Appellee filed a motion for new trial, claiming he received ineffective assistance of

counsel during his trial. (1CR91). Appellee argued that his trial counsel had a conflict of interest, and that his trial counsel failed to conduct a reasonable investigation into evidence that could have undermined Angela's and Rhonda's credibility. (1CR91). The trial court allowed that motion to be overruled by operation of law, and Appellee did not appeal his conviction.

III. The Habeas Proceedings

On February 6, 2023, Appellee filed a post-conviction application for writ of habeas corpus under Articles 11.072 and 11.073 of the Code of Criminal Procedure, alleging that (1) his right due process was violated when the State offered material false evidence at his trial, (2) he is actually innocent based on newly discoverable evidence, and (3) newly available scientific evidence entitles him to relief. (1CR118).

Attached to Appellee's habeas corpus petition is an expert report, dated January 20, 2023, from Dr. Eric Ellis, a general dentist. (1st Supp CR at App. Ex. "G" at p. 1 of 31, CR53). Appellee retained Dr. Ellis for purposes of providing an opinion on whether the police photos and personal photos of Rhonda align with Rhonda's account of the assault. (1st Supp CR at App. Ex. "G" at pp. 1-2, CR54-55). Dr. Ellis reviewed trial testimony, the photos of Rhonda, an Indiana Officer's Standard Crash Report, dated August 31, 2015, stemming from a motor vehicle accident involving Rhonda about five months

before the assault, Rhonda's emergency room records from the day of the assault, and the offense reports. (1st Supp CR at App. Ex. "G" at pp. 1-2, CR54-55).

The following findings and conclusions by Dr. Ellis are relevant to this appeal:

- The police photos of Rhonda are credible and do not represent or demonstrate traumatic injury consistent with Rhonda's testimony.
- The police photo of the front of Rhonda's face "appears normal and does not demonstrate injury."
- The police photo of the left and side of Rhonda's face "does not appear abnormal or demonstrate injury."
- The personal photos of Rhonda are inconsistent with Rhonda's testimony and are not credible.
- Rhonda's injury, as shown by the police photos, are inconsistent with the offense report and Rhonda's medical records.
- The police photos of Rhonda show a distinctive absence of any trauma.
- "[T]he correlation of the photographic appearance relative to any serious injury is speculative and NOT supported by the evidence."
- "The type of fracture identified in the medical record is more consistent with the typical mandibular fracture associated with a motor vehicle accident."

- Todd Moffat did not fracture Rhonda's mandible.

- The allegation of a "closed fist" strike to the left side of Rhonda's face is inconsistent with the photographic evidence and presenting physical evidence/testimony.

- The allegations of "he shoved me and pushed me down" is inconsistent with the presenting evidence.

- Rhonda Deem did not receive a "closed fist strike to the left side of her face."

- Rhonda's testimony is unreliable.

- "The evidence received and observed in this matter is inconsistent with the injury and does not support the accusation of violent family assault."

(1st Supp. CR at App. Ex. "G" at pp. 3-4, CR56-57).

In his habeas petition, Appellee described Dr. Ellis's report and the Indiana Crash Report as newly discovered scientific evidence. (1CR116). Appellee asserted the newly discovered evidence proved that Rhonda's assault allegations were false, that the injuries alleged by Rhonda were medically impossible, and that the personal photos of Rhonda were altered because they show "markedly different injuries" than the police photos. (1CR131).

Opposing Appellee's habeas petition, the State offered several exhibits, including an affidavit from Rhonda, who stated that her "testimony in

[Appellee's] trial was completely truthful." (5RR at St. Ex. 1 at pp. 9).[7] As it relates to the Indiana crash, Rhonda stated it was a minor sideswipe collision, that neither she nor the other driver suffered any injuries, as reflected by the crash report, and that the airbags in her vehicle never deployed. (5RR at St. Ex. 1. at pp. 2-4). Rhonda stated that she "never sought medical or dental treatment for any pain or injury resulting from this collision," and that she never went "to the hospital, urgent care facility, or emergency room for any treatment after this accident." (5RR at St. Ex. 1. At pp. 3-4).

Rhonda did, however, go to her dentist on January 28, 2016, five days after Appellee assaulted her, and her dentist noted that she presented with "trauma to her face. Her left eye and cheek are bruised and swollen. She has soreness in her left TMJ area and can't bite real hard … the CT scan done in the ER in TX revealed a possible hairline fracture … I believe the concussion to the right mandible caused a compression injury to the left TMJ and she has an inflammatory response occurring." (5RR at St. Ex. 6 at p. 1 of 1).

By contrast, Rhonda's other medical records did not indicate that she had gone to a doctor with a complaint about pain in her jaw after the car accident Dr. Ellis opined was the true cause of her broken jaw. (5RR"C").

[7] References to Rhonda's affidavit refer to the pagination of the original affidavit, which appears in the bottom, middle of the pages on the affidavit, because the entirety of the volume is not internally paginated.

Following a hearing, the trial court granted Appellee's post-conviction writ of habeas corpus, concluding that Appellee presented newly discovered evidence demonstrating he was convicted with false or misleading evidence and was actually innocent. (4CR437). The following findings by the trial court are relevant to this appeal:

> 55. The Court finds, by a preponderance of the evidence, false or misleading evidence was introduced at trial to convict Todd Moffat of assault. (4CR447).
> 56. Dr. Ellis' expert report and conclusions are credible. (4CR447).
> 58. The Indiana Officer's Standard Crash Report ("the crash report") is newly discovered evidence not introduced in trial. (4CR449).

The following conclusions by the trial court are relevant to this appeal:

> 17. By a preponderance of the evidence, Applicant has shown that the additional photographs sponsored by Rhonda Deem were false or misleading. (4CR452).
> 18. By a preponderance of the evidence, Applicant has shown the additional photographs sponsored by Rhonda Deem were material and had a likelihood of influencing the jury or gave the jury a false impression. (4CR452).
> 28. By clear and convincing evidence, Applicant has shown newly discovered evidence that creates a doubt as to the reliability of the result sufficient to undermine confidence in the verdict. (4CR453).
> 29. Rhonda Deem provided statements to police on the day of the incident that Todd Moffat pushed her against a kitchen wall causing her to strike the right side of her head and punched her in the face with a closed fist. (4CR454).
> 30. Applicant has provided newly discovered evidence in Dr. Ellis expert report challenging the allegations that Rhonda Deem was punched in the face by Todd Moffat with expert

medical conclusions that the photographs are inconsistent with the allegations. (4CR454).

31. Applicant has provided newly discovered evidence that Rhonda Deem was involved in an automobile accident just 5 months before this incident. Dr. Ellis' expert opinion that it can be inferred the mandibular fracture visualized at the emergency room was the result of an automobile accident and is not consistent with primary trauma to the face as alleged. (4CR454).
32. Based on Applicant's newly discovered evidence and the prosecution's evidence as a whole, it cannot be said that the newly discovered evidence does not create doubt as to the reliability of the result sufficient to undermine confidence in the verdict. (4CR454).

SUMMARY OF THE ARGUMENT

The trial court erred when it found that Appellee was convicted by materially false evidence. The only basis for the trial court's finding is Dr. Ellis's opinion that the photos and medical records do not prove Rhonda was punched with a closed fist, breaking her jaw. But Appellee was not charged with punching Rhonda with a closed fist, nor breaking her jaw; he was charged with causing her bodily injury (i.e., pain) by using his hand or hands. There was copious evidence, which Dr. Ellis's opinion does not contradict, that Appellee did exactly what he was convicted of doing. Thus, the evidence at trial was not false. Further, the portions of the evidence about which Dr. Ellis opines were false were not material because, again, these items of evidence were not necessary to prove up the actual charged offense, and even if the jury

disbelieved them, there was still copious evidence on which to base a guilty verdict.

The trial court also erred by finding that Dr. Ellis's opinion proved Appellee's actual innocence. Dr. Ellis's opinion, at most, would have served to impeach Rhonda's credibility. Dr. Ellis's opinion did not prove that Appellee did not commit the crime with which he was charged. In fact, Dr. Ellis noted in his affidavit that some of the injuries shown in photos admitted at trial could have been caused by the assault she described. Being that, at most, Dr. Ellis's opinion would have impeached Rhonda's credibility, it did not prove that Appellee was actually innocent.

STANDARD OF REVIEW

A writ of habeas corpus is an extraordinary remedy. *Ex parte Smith*, 444 S.W.3d 661, 666 (Tex. Crim. App. 2014). Article 11.072 establishes the procedure for an Appellee to seek habeas relief "from an order or a judgment of conviction ordering community supervision." Tex. Code Crim. Proc. Ann. art. 11.072, §1. Under the article, a person serving or who has completed community supervision may file a habeas application attacking the "legal validity" of (1) the conviction for which or order in which community supervision was imposed or (2) the conditions of community supervision. Tex. Code Crim. Proc. art. 11.072, §2. An Appellee seeking habeas relief bears the

burden of proving his claim by a preponderance of the evidence. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016).

Appellate courts review a trial court's ruling on an application for writ of habeas corpus for an abuse of discretion. *Ex parte Contreras*, 640 S.W.3d 279, 282 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Id.*; *Ex parte Allen*, 619 S.W.3d 813, 816 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd). In other words, a trial court abuses its discretion if its decision lies outside the zone of reasonable disagreement. *Ex parte Allen,* 619 S.W.3d at 816.

In reviewing a trial court's ruling on an application for writ of habeas corpus, appellate courts consider the evidence in the light most favorable to the trial court's ruling. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). For habeas proceedings under article 11.072, the trial court is the sole finder of fact, and appellate courts afford almost total deference to a trial court's factual findings when they are supported by the record, especially when they are based upon credibility and demeanor. *Ex parte Torres*, 483 S.W.3d at 42. However, appellate courts "review *de novo* the trial court's resolution of mixed questions of law and fact that do not turn on witness

credibility and its resolution of pure questions of law." *Ex parte Beck*, 541 S.W.3d 846, 852 (Tex. Crim. App. 2017).

THE STATE'S FIRST POINT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEE HABEAS RELIEF ON THE GROUNDS THAT HE WAS CONVICTED BY FALSE, MATERIAL EVIDENCE BECAUSE THE CONTRAVENING EVIDENCE APPELLEE PRESENTED AT THE HABEAS HEARING DID NOTHING MORE THAN IMPEACH THE TRIAL WITNESSES' CREDIBILITY

"The use of material false testimony to procure a conviction violates a defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution." *Ukwuachu v. State*, 613 S.W.3d 149, 156 (Tex. Crim. App. 2020). In reviewing false testimony claims, we must determine whether: (1) the testimony was actually false, and (2) whether it was material. *Id.* "To establish falsity, the record must contain some credible evidence that clearly undermines the evidence adduced at trial, thereby demonstrating that the challenged testimony was, in fact, false." *Ex parte Reed*, 670 S.W.3d 689, 767 (Tex. Crim. App. 2023). The evidence of falsity must be definitive or highly persuasive. *Id.*

Under the first prong, the evidence need not demonstrate perjured testimony, only that the testimony left the jury with a false or misleading impression. *Ex parte Reed*, 670 S.W.3d at 767. The second prong in a false-testimony claim is materiality, not harm. *Ex Parte Weinstein*, 421 S.W.3d 656,

665 (Tex. Crim. App. 2014). False testimony is material only if there is a "reasonable likelihood" that it affected the judgment of the jury. *Id.* In proving a false testimony claim, an Appellee must prove by a preponderance of the evidence that the false testimony was material and thus it was reasonably likely to influence the judgment of the jury. *Id.*

A. Neither Dr. Ellis's report nor the Indiana Crash Report established Appellee was convicted with false or misleading evidence.

Appellee was charged in the underlying case with the offense of misdemeanor assault under Texas Penal Code section 22.01(a)(1). (1CR7). Under that Penal Code section, "a person commits an offense if the person: intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse…." Tex. Pen. Code 22.01(a)(1). "Bodily injury" means physical pain, illness, or impairment of physical condition. Tex. Penal Code Ann. §1.07(8). The information alleged that Appellee "intentionally, knowingly, or recklessly cause[d] bodily injury to Rhonda Deem by striking her with his hand or hands and pushing her with his hand or hands." (1CR7). The jury charge instructed the jury that if they believed beyond a reasonable doubt that Appellee "intentionally, knowingly, or recklessly caused bodily injury to Rhonda Deem by striking her with his hand or hands or pushing her with his hand or hands" then they were to find

Appellee guilty as charged in the information. (1CR46-47). The jury did so find, and Appellee argued in his writ of habeas corpus, which the trial court granted, that he was convicted using false evidence. (1CR115).

The trial court based its order granting Appellee relief on his application for a writ of habeas corpus on Dr. Ellis's contention that the personal photos of Rhonda were false or misleading. However, neither Dr. Ellis's report, nor the Indiana Crash Report which he referred to in his affidavit, proved that the personal photos of Rhonda are false or misleading. At best, Dr. Ellis's affidavit created a conflict in the trial evidence that a reasonable juror could resolve against Appellee. Therefore, the trial court erred when it found that the State used false or misleading evidence to convict Appellee of assault.

The Texas Court of Criminal has held that inconsistencies in a witnesses' trial testimony do not, without more, show that the witnesses' testimony is false. *Ex parte De La Cruz*, 466 S.W.3d 855, 867–68, 871 (Tex. Crim. App. 2015) (finding that inconsistencies in eyewitness's trial testimony compared with expert witness's opinion, with respect to number of times victim was shot and location of shooting, did not, without more, support finding that witness's testimony was false) (citing *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) (stating that fact that witness may have given earlier inconsistent statement, or that other witnesses may have conflicting

recollection of events, does not establish that witness's testimony was false)). Instead, contradictory witness testimony during trial "merely establishes a credibility question for the jury" to decide and "does not suffice to demonstrate" that the evidence gave the jury a false impression. *Id.* at 871 (quoting *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990)).

The trial court found that Dr. Ellis's report established that the personal photos of Rhonda are inconsistent with her trial testimony that Appellee pushed her against a kitchen wall causing her to strike the right side of her head and punched her in the face with a closed fist. (4CR448). The trial court also found that Dr. Ellis's report established that the fracture observed on Rhonda's CT scan resulted from a motor vehicle collision five months before the assault. (4CR454). That said, even when this Court defers to the trial court's finding that Dr. Ellis's opinion is credible, Dr. Ellis's opinion merely emphasized a credibility attack on Rhonda and Angela's testimony, it did not prove the personal photos of Rhonda or Rhonda's trial testimony was false. *Losada v. State*, 721 S.W.2d 305, 312 (Tex. Crim. App. 1986).

Although Dr. Ellis found that the credible police photos showed a distinctive absence of any trauma, Deputy Haydel testified that one of the credible police photos revealed "a slight amount of swelling" and "a slight raised reddish area" on the right side of Rhonda's face, near her cheekbone.

As it relates to the personal photos, Dr. Ellis detailed the differences between the police photos and the personal photos. But the jury considered evidence that visible bruising is not the only indicator of assault. Detective Worsham testified that his experience with domestic violence cases has taught him that bruises may "start out light, and over the five-day period they become to a point of real darkness, and then they start to yellow around the edge and then slowly disseminate." This is, of course, merely a matter of common knowledge – anyone who has ever seen a boxing match knows that one can be struck by a great many hard blows to the face before visible bruising and swelling appear. It also bears mentioning that Dr. Ellis's opinion that the evidence was not consistent with a closed fist strike to Rhonda's face is ultimately, at most, an attack on the witnesses' credibility, because Appellant was not charged with punching Rhonda in the face with a closed fist, but rather causing her pain by striking her with his hand, or pushing her with his hand . (1CR7).

It should also be noted that Dr. Ellis's affidavit is not uniformly supportive of Appellee's claims that he is actually innocent or was convicted using false evidence. Dr. Ellis asserts that Rhonda's "personal photos," which were admitted as State's Exhibits 9-13 are not consistent with a closed fist strike to the face, he nevertheless states that "It is possible to assume, based

on the testimony of 'slamming my head against the wall' that the bruising on the right side of [Rhonda's] face evident in the photographs is related to the allegation." (1st Supp CR at App. Ex. "G" at pp.18-19, CR71-72).

If Dr. Ellis had testified in the trial, his testimony would, at best, have established a credibility question for the jury, it would not have vindicated Appellee. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008) (holding in case involving contradictory testimonial evidence that it was for jury to determine whether two witnesses were lying or telling truth); *see also* Tex. Code Crim. Proc. art. 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved and of the weight to be given to the testimony...."). Dr. Ellis never opined that Rhonda falsified the photographs, nor did Dr. Ellis opine that any witness provided false testimony. Rather, he opined that the photographs and medical records were not consistent with a closed fist strike to Rhonda's face that caused a broken jaw. That opinion (which by his own admission did not involve a review the x-rays of Rhonda's injury), still said nothing to dispute the proposition that Appellee struck or pushed Rhonda with his hands and caused her pain. Thus, his opinion does nothing to undermine the jury's finding that Appellee struck or pushed Rhonda with his hands and caused her pain.

For instance, Dr. Ellis opined that "the correlation of the photographic appearance relative to any serious injury is speculative and NOT supported by the evidence." But Appellee's assault charge required "bodily injury," not "serious bodily injury." Further, Dr. Ellis opined that the photos and medical records do not demonstrate Appellee fractured Rhonda's jaw. Dr. Ellis opined that "[t]he type of fracture identified in the medical record is more consistent with the typical mandibular fracture associated with a motor vehicle accident." But the crash report does not indicate Rhonda, or anyone else, was injured in the collision. And Rhonda, who has personal knowledge of the Indiana crash, confirmed in her affidavit that neither her nor the other driver suffered any injuries, and that she "never sought medical or dental treatment for any pain or injury resulting from this collision."

Even more, in granting habeas relief, the trial court found that Rhonda "did not testify that she was involved in an automobile accident just five months before [the assault]." But in the trial, Rhonda was never questioned about whether she was in car crash before the assault, and there is no evidence that Rhonda hid the fact that she was in an accident to misrepresent her injuries. At trial, Appellee's defense counsel cross-examined the State's witnesses, challenging their recollection of events and challenging the veracity of Rhonda's injuries depicted in the photos.

"Since habeas is not an opportunity to re-hash issues fully and fairly litigated before a jury, a habeas court must defer to the jury's judgment about the weight and credibility of evidence presented at trial." *Ex parte McGregor*, No. WR-85,833-01, 2019 WL 2439453, at *9 (Tex. Crim. App. June 12, 2019). Because the trial court here circumvented the jury's role by finding Dr. Ellis's report did more than create a credibility question, the trial court's judgment lies outside the zone of reasonable disagreement and should be reversed.

B. The personal photos of Rhonda were not material.

For similar reasons, the personal photos (State's exhibits 9-13) of Rhonda were not material to the jury's verdict. In convicting Appellee, the jury found that he "intentionally, knowingly, or recklessly, caused bodily injury to [Rhonda] by striking her with his hand or hands or pushing her with his hand, or hands." (1CR7; 46-47). So, even though Dr. Ellis found that Appellee striking Rhonda with a closed fist is inconsistent with the photographic evidence, the jury did not find Appellee assaulted Rhonda with a closed fist; the jury found Appellee assaulted Rhonda by using his hands.

"Bodily injury" means physical pain, illness, or impairment of physical condition. Tex. Penal Code Ann. § 1.07(8). Thus, "bodily injury" does not specifically require visible manifestation of pain. *Id.* Rhonda testified in the

trial that, after being assaulted, she felt "quite a bit of pain." Additionally, Dr. Ellis found the police photos credible, and Deputy Haydel testified one of the police photos revealed "a slight amount of swelling" and "a slight raised reddish area" on the right side of Rhonda's face, near her cheekbone. The jury also heard testimony that an assault may not result in visible injuries right away.

Because visible bruising is not a requirement of bodily injury, because Rhonda was in physical pain following the assault, because Deputy Haydel testified that visible bruising was apparent from the police photos, and because the jury considered testimony that an assault may not result in visible injuries right away, it is unlikely the photos taken by Rhonda affected the judgment of the jury.

Even assuming these photos were in fact false, they were not material. The Texas Court of Criminal Appeals has defined the question of materiality in the context of whether the purportedly false evidence was "the tipping point." *Ex Parte Weinstein*, 421 S.W.3d 656, 669 (Tex. Crim. App. 2014). In *Weinstein*, the applicant claimed that he was convicted using false evidence, where a jailhouse informant who testified the applicant had confessed the offense to him, falsely denied that he had not suffered from hallucinations in the past. *Id*. at 659. As the Court of Criminal Appeals put it, the jailhouse

informant's denial of having had hallucinations in the past was "flatly incorrect." *Id*. at 666. Thus, there was no question the testimony was false, and the question then became whether that testimony was material. *Id*. at 667.

The Court of Criminal Appeals ultimately held that the fact that the jailhouse informant falsely testified that he had not previously had hallucinations was not material. *Id*. at 669. In so holding, the Court of Criminal Appeals noted that the State's evidence corroborated numerous aspects of the jailhouse informant's testimony, and there was significant circumstantial evidence of motive, such that the jailhouse informant's testimony was "very unlikely [to have been] the tipping point." *Id*. at 669.

The photos and the evidence of the hairline fracture to Rhonda's jaw are, much like the evidence of hallucinations in *Weinstein*, even if we presume they were false, "very unlikely [to have been] the tipping point," but rather, there was a significant body of evidence in the record on which the jury could have based its guilty verdict, aside from these items. *Id*. at 669. Firstly, there was direct testimony from Angela that Appellee knocked Rhonda to the ground, there was testimony from Rhonda that Appellee punched her in the face, the responding police officer said he saw swelling on Rhonda's face, and the medical records from a few days after the assault indicated that Rhonda's face was swollen and she was having pain chewing. Further, the

circumstantial evidence corroborated the direct testimony that Appellee assaulted Rhonda; there was spilled soda and vomit in the house as Angela and Rhonda described; Appellee fled the scene; and Appellee did not return to the scene until after he had called the police to notify them he was on his way to the scene, which he would have had no reason to do if he did not believe that an assault had been reported.

It should also be noted that Appellee did not present an alternative theory of the case at trial, but rather attacked the credibility of the witnesses, as did the defendant in *Weinstein*. Thus, it stands to reason that the evidence of which Appellee now complains, even presuming it was false, was not material in light of all of the other evidence on which the jury could rely to find that Appellee struck Rhonda with his hand and caused her pain. That this evidence was not material in light of the totality of the State's evidence on which the jury could have relied to find Appellant guilty is a proposition supported by a litany of Texas case law. *See, e.g.*, *De La Cruz*, 466 S.W.3d at 871 (even assuming medical examiner's revised opinion that victim was shot in a different location than previously thought and shot twice as opposed to once indicated that eyewitness testimony victim was shot once at one location and then transported to location where body was found was false, eyewitness testimony was not materially false because this portion of eyewitness

testimony was not material to jury's determination of guilt or innocence); *Rodriguez v. State*, 491 S.W.3d 18, 32 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (assertion that victim's testimony about the severity of his injury and length of hospital stay, even assuming they were false, were not material where it was undisputed that appellant shot victim); *Ex parte Sheikh*, No. 03-10-00370-CR, 2012 WL 3599826 at *7 (Tex. App.—Austin Aug. 17, 2012, pet. ref'd) (mem. op., not designated or publication) (reversing trial court finding that emergency room doctor's testimony that he was "chief of Ben Taub emergency room" rather than "chief surgical resident" was material falsehood because despite being technically inaccurate, the doctor accurately described his duties and responsibilities).

This Court should hold that the trial court erred when it held that Appellee was convicted by materially false evidence.

THE STATE'S SECOND POINT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEE HABEAS RELIEF ON THE GROUNDS THAT HE WAS ACTUALLY INNOCENT BECAUSE THE EVIDENCE APPELLEE PRESENTED AT THE HABEAS HEARING DID NOTHING MORE THAN CONTEST THE TRIAL WITNESSES' CREDIBILITY

Appellee argued in his application for a writ of habeas corpus that he was actually innocent based on newly discovered evidence; i.e. Dr. Ellis's affidavit. (1CR123-29). The trial court granted Appellee habeas relief, in

part, on that basis. (4CR452-54). The trial court erred in this conclusion because the evidence on which Appellee relied in making this claim is neither newly discovered, nor does it establish his actual innocence.

A *Herrera*-type actual innocence claim is a substantive claim in which the Appellee asserts a "bare claim of innocence based solely on newly discovered evidence." *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002). When, as here, an Appellee asserts actual innocence based on a *Herrera*-type claim, the habeas court must first consider whether the Appellee presented newly discovered evidence that affirmatively establishes his innocence. *Franklin*, 72 S.W.3d at 678; *Ex parte Calderon*, 309 S.W.3d 64, 65 (Tex.Crim.App.2010); *Ex parte Brown*, 205 S.W.3d 538, 54 (Tex. Crim. App. 2006).

Establishing a bare claim of actual innocence is a Herculean task. *Ex parte Brown*, 205 S.W.3d at 545.

> This is because the habeas Appellee is challenging what is presumed to be an error-free trial with the full panoply of protections that our Constitution affords criminal defendants. A conviction that results from a constitutionally error-free trial is entitled to the greatest respect. Thus, under a *Herrera* claim of actual innocence, we require newly discovered evidence that was not known to the Appellee at the time of trial and could not be known to him even with the exercise of reasonable due diligence.

Ex parte Cook, 691 S.W.3d 532, 560 (Tex. Crim. App. 2024) (internal citations and quotations omitted).

Even when the Appellee presents newly discovered evidence, habeas relief may only be granted when the Appellee establishes "by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the Appellee guilty in light of the new evidence." *Ex parte Brown,* 205 S.W.3d at 545. Thus, the Appellee must do more than merely raise doubts about his guilt—he must produce 'affirmative evidence' of innocence." *Ex parte Cook*, 691 S.W.3d at 561. Reviewing courts "analyze the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole." *Id.* (internal citations and quotations omitted). Thus, relief is warranted only when "the totality of the new evidence of innocence unquestionably establishes that a jury would not have found the defendant guilty in light of the new evidence when weighed against the old evidence establishing guilt." *Id.* (internal citations and quotations omitted).

A. Neither Dr. Ellis's Report nor the Indiana Crash Report qualifies as newly discovered evidence.

The trial court concluded that "[b]y clear and convincing evidence, Appellee has shown newly discovered evidence that creates a doubt as to the reliability of the result sufficient to undermine confidence in the verdict." (4CR453). In other words, the trial court concluded Appellee was actually

innocent based on Dr. Ellis's report and the Indiana Crash Report. But the trial court abused its discretion in doing so.

Put simply, the trial court confuses "newly presented evidence" with "newly discovered evidence." Although Dr. Ellis's report and the Indiana Crash Report are new to the proceedings, Appellee could have discovered Dr. Ellis's report and the Indiana Crash Report at the time of trial with due diligence; thus, Dr. Ellis's report and the Indiana crash report do not entitle Appellee to habeas relief.

A habeas Appellee must not only convincingly demonstrate their innocence, but the habeas Appellee must also establish that the evidence they are presenting is "newly discovered" or "newly available." *Ex parte Brown,* 205 S.W.3d at 545. "The term 'newly discovered evidence' refers to evidence that was not known to the Appellee at the time of trial and could not be known to him even with the exercise of due diligence. He cannot rely upon evidence or facts that were available at the time of his trial, plea, or post-trial motions, such as a motion for new trial." *Id*. "The trial is 'the main event,' it is not a try-out on the road to a post-conviction writ of habeas corpus. A claim of actual innocence is not an open window through which an Appellee may climb in and out of the courthouse to relitigate the same claim before different judges at different times." *Id.* at 545-46.

Here, Appellee is trying to relitigate the same defensive theories he argued in the trial and in his motion for new trial, which is not the purpose of Article 11.072. At his trial, Appellee challenged the veracity of Rhonda's injuries depicted in the police photos and the personal photos. Appellee did so by cross-examining the State's witnesses, but he could have done so in other ways, such as offering the testimony of an expert, like Dr. Ellis, to testify at his trial regarding the expert's opinion of the photos in question; remember, Appellee had access to Rhonda's personal photos at least six months before trial. Further, nothing in the record indicates Appellee could not have located the Indiana Crash Report before trial with due diligence. Nor does the record indicate Rhonda was hiding the Indiana Crash Report from Appellee. Clearly, at the time of trial, Appellee was not concerned about his mother-in-law's history of motor vehicle collisions, because he never questioned Rhonda at trial about whether she had any collisions before the assault.

Texas law does not authorize habeas relief to habeas applicants who fail to exercise due diligence at the time of trial. *Ex parte Brown*, 205 S.W.3d at 456. If Appellee's strategy at trial was to blame Rhonda's fractured jaw on something other than the assault, he lost the opportunity to blame it on the Indiana crash by failing to exercise due diligence. Being that Rhonda is his mother-in-law, Appellee in all likelihood knew about the car crash, but elected

to attack Rhonda's credibility another way, and understandably so considering the Indiana Crash Report does not indicate Rhonda suffered any injuries. For these reasons, the trial court abused its discretion in finding that the evidence on which Appellee relied in his application for a writ of habeas corpus was newly discovered.

B. Neither Dr. Ellis's Report nor the Indiana Crash Report constituted affirmative evidence that Appellee was actually innocent.

Dr. Ellis's opinion and the Indiana Crash Report he referred to merely created a credibility question for the jury, and they do not constitute affirmative evidence that Appellee was actually innocent. *Ex parte Philip*, 672 S.W.3d 138, 139–40 (Tex. Crim. App. 2023) (per curiam).

Dr. Ellis's affidavit stated, in relevant part, that the personal photos of Rhonda showing her injuries days after the assault were not consistent with her being punched in the face. (1st Supp CR at App. Ex. "G" at pp. 3-4, 16-21, CR69-74). Dr. Ellis also stated in his affidavit that he believed Rhonda did not receive a fracture to her jaw from the assault, but rather from a car accident five months prior to the assault. (1st Supp CR at App. Ex. "G" at pp. 28-30, CR81-83). The trial court relied on these two assertions by Dr. Ellis in finding that Appellee was actually innocent. (4CR453-54). But there is simply no escaping that the trial court's ruling is erroneous because Appellee

was not charged with punching Rhonda in the face, nor was he charged with fracturing her jaw. Appellee was charged with striking Rhonda with his hand or hands or pushing her with his hand or hands causing bodily injury; i.e., pain. (1CR7). Therefore, even if Dr. Ellis's opinion had been presented at trial, and the jury believed every word of it, they could still have found Appellee guilty as charged, because Dr. Ellis's testimony would not have negated any of the proof of the allegations with which Appellee was actually charged. In short, it hardly stands to reason that the jury could have believed every word in Dr. Ellis's affidavit and still convicted Appellee based on the evidence presented at trial, and yet that Dr. Ellis's affidavit also establishes that Appellee is actually innocent.

Not only does the trial court's conclusion defy logic, it is contradicted by the case law. *See, e.g.*, *Philip*, 672 S.W.3d at 144 (rejecting trial court finding that victim's recantation established actual innocence where victim was sole witness to aggravated sexual assault of a child); *Ex parte Spencer*, 337 S.W.3d 869, 879-80 (Tex. Crim. App. 2011) (rejecting trial court finding of actual innocence in aggravated robbery case where expert opined that conditions were too dark for witness to have seen applicant's face); *Franklin*, 72 S.W.3d at 674-79 (rejecting trial court finding of actual innocence in aggravated sexual assault of a child case where victim's admission she had

been sexually assaulted by her step-father was "important," but did not establish actual innocence but rather impeached her credibility generally); *Ex parte Sanchez*, No. 05-13-00679-CR, 2013 WL 4528561, at *5-6 (Tex. App.—Dallas Aug. 27, 2013, no pet.) (mem. op., not designated for publication) (applicant's claim that her husband's affidavit saying he had put child into vehicle applicant was driving without her knowledge where applicant claimed she did not intentionally abandon child in hot car was not sufficient to establish actual innocence).

This Court should overrule the trial court's grant of habeas relief and reinstate Appellee's conviction and sentence because he did not present newly discovered evidence establishing that he was actually innocent.

PRAYER

Wherefore, premises considered, the State of Texas prays that this Court reverse the trial court's grant of habeas relief and reinstate Appellee's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jason Bennyhoff, do hereby certify that a true and correct copy of the foregoing Brief was sent to counsel for the Appellant on March 17, 2025, via email by way of electronic service through Defile Texas at the email address provided.

/s/ Jason Bennyhoff
Jason Bennyhoff

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