**Affirmed and Opinion filed October 28, 1999.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-00895-CR**
**NO. 14-98-00896-CR**

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**EDWARD GEORGE LEWIS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 339th District Court**
**Harris County, Texas**
**Trial Court Cause Nos. 763,164 & 785,567**

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## O P I N I O N

Appellant was charged by two indictments for the offenses of murder and aggravated assault. A jury found appellant guilty of the lesser included offense of manslaughter and guilty of the charged offense of aggravated assault and assessed punishment at twenty years confinement for each offense, to be served concurrently. Appellant raises ten points of error challenging his conviction: (1) improper cross-examination and jury argument by the State, (2) prejudicial cross-examination of appellant, (3) improper inclusion of manslaughter as a lesser included offense; (4) misrepresentation of the law by the State to the jury, (5)

invalid verdict of the jury, (6) insufficient evidence of aggravated assault, (7) erroneous admission of hearsay evidence, (8) improper admission of prejudicial photographs, (9) ineffective assistance of counsel, and (10) failure of the trial court to give appellant a complete copy of the trial transcripts.[1] We affirm.

## BACKGROUND

On August 24, 1997, appellant and several of his friends went to the Exis nightclub in southeast Houston. Appellant rode in one car, along with his then-girlfriend Erica Suniga and his friend Gilbert Pesina, who drove. Appellant's friends Mary Alice Andrade, Miguel Guajardo, Miguel Serna, and Paul Castellano rode in another car. Before leaving, appellant took his .22 caliber rifle out of his car and placed it in the trunk of Pesina's car.

Upon their arrival at the club, the group was informed that police had raided the club and it was closed for the evening. Appellant and his friends walked back toward their cars in the parking lot and encountered another group of people leaving the club, including the two complainants, Jesse Castillo and Shana Buck.[2] The two groups got into a minor confrontation, during which appellant referred to himself as a member of the street gang Crip Cartel, and Castillo referred to himself as a "crip killer." A Houston Police officer witnessed the altercation and ordered all the individuals involved to leave. Both groups of people left the club parking lot in their respective cars. Appellant and his friends rode in the same cars they arrived in. Buck got into the driver's seat of her boyfriend's car; Castillo got into his car with passengers Roy Sanchez and Victor Martinez.

Guajardo, one of appellant's friends, testified that before entering the freeway, Castillo displayed a handgun. Andrade and Guajardo testified that upon seeing the gun,

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[1] Appellant's appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Appellant then filed a brief on his own behalf.

[2] We note that although this court customarily declines to refer to complainants by name within the opinion, we will do so in this case given the somewhat complicated factual pattern.

they were frightened and drove away quickly. Those riding in appellant's car did not witness this exchange.

Buck and Castillo entered the freeway and were soon approached from the rear by Pesina's car. There was conflicting testimony whether Castillo displayed a gun to appellant, but it was established that Castillo did have a .22 caliber pistol in his car. Appellant asked his girlfriend, Suniga, to remove his rifle from the trunk of the car, which could be reached from the backseat. Pesina accelerated past the cars driven by Castillo and Buck as appellant fired his rifle several times at both vehicles. Buck was not injured, but Castillo was pronounced dead of a gunshot wound to the chest shortly after Sanchez and Martinez brought him to the hospital.

## ANALYSIS

### I. Improper Cross-Examination and Jury Argument by the State

In his first point of error, appellant contends that the State improperly cross-examined him during the punishment phase. Appellant also argues that two jury arguments offered by the State were also improper.[3]

### A. Improper Cross-Examination

The cross-examination questioning appellant objects to occurred during the following exchange between the State and appellant:

> Q: Well, do you remember the other day when you went down in the elevator?

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[3] Appellant has combined two complaints, improper cross-examination and improper jury argument, within a single point of error. A point of error that contains more than one specific ground of error is multifarious. *See Marcum v. State*, 983 S.W.2d 762, 767 n.1 (Tex. App.--Houston [14th Dist.] 1998, pet. ref'd). If a point of error is multifarious, the court may refuse to review it. *See id.* We may, however, consider multifarious points of error if we can determine, with reasonable certainty, the alleged error about which complaint is made. *See id.* Because we are able to discern the errors about which appellant complains, we will, in the interest of justice, consider his complaints. *See id.*

A: Yes, sir.

Q: Do you remember smiling at them?

A: No, sir, I have proof from the deputy. The deputy sheriff that I was at — he had me handcuffed against the elevator. We can bring him in. I had told him that they were threatening me. They said they were going to shoot me. One of the dudes — because he had me against the elevator like this, so I had to face towards that way. And I glanced over there and one of the dudes was telling me like that (indicating), they were going to shoot me. And I told them three times — you can ask him — I told him, "Did you see they threatened me?" And he looked. By the time he looked, they had like turned around and walked inside the elevator. And if you want to prove it, you can call him in here and we will ask him.

Q: Did you smile at Beatrice Castillo?

A: No, sir, I never did smile at her. I don't think nothing is funny about it, both of us getting hurt. They hurt about him — he died. And I'm hurting, just like my family, me and my son.

To preserve a complaint for appellate review, an appellant must have made a specific, timely objection at the earliest possible opportunity. *See Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995); *Burks v. State*, 876 S.W.2d 877, 899 (Tex. Crim. App. 1994); *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991); TEX. R. APP. P. 33.1(a). Appellant did not object to this line of cross-examination, and therefore, forfeited his right to raise this complaint on appeal. *See id.*

**B. Improper Jury Argument**

The two exchanges appellant objects to occurred during the State's closing arguments, also during the punishment phase. Appellant first objects to the State's argument, "This is not a case of rehabilitation. This is a case of protection. Protecting the citizens of Harris County from people like him and sending a message to people like them..." Appellant also objects to the following argument by the State:

STATE: He, however, deserves the maximum. Because you know that he is getting better at being violent. And if you put him on the

> streets, that license to kill, who is going to be the next time. Nobody knows. Give him probation, send him down in the elevator with those folks, that will make him feel real good.
>
> DEFENSE: Improper argument and also not necessarily what's going to happen.
>
> THE COURT: Overruled. Go ahead.

A defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Almanza v. State*, 945 S.W.2d 187, 188 (Tex. App.--San Antonio 1997, pet. ref'd); TEX. R. APP. P. 33.1(a). Appellant did not object to the State's closing argument urging the jury to protect the citizens from people like appellant, and therefore, forfeited his right to challenge that argument on appeal.

Appellant did object to the other argument, referring to probation and sending appellant down in the elevator. Therefore, appellant's objection to this portion of the State's argument was properly preserved for appellate review. *See id.*

There are four permissible areas of jury argument: (1) summation of evidence, (2) reasonable deductions from the evidence, (3) an answer to the arguments of opposing counsel, and (4) pleas for law enforcement. *See Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992). An argument that exceeds these bounds is erroneous. *See id.* at 95. The trial court's decision to allow the argument is, however, reversible only if, in light of the record as a whole, the argument is extremely or manifestly improper, violative of a mandatory statute, or injects new facts, harmful to the accused, into the trial. *See id.*

In the instant case, the State's argument, while arguably an unorthodox method, was a proper plea for law enforcement. The State was, in essence, asking the jury to sentence appellant to the maximum penalty allowed. The State used sarcasm to emphasize the absurdity of sending appellant back on the street, to possibly kill again, with only probation.

Even if the statement could not be categorized as a plea for law enforcement, viewing the statement in light of the record as a whole, the argument is not manifestly or extremely improper. A statement made during jury argument must be analyzed in light of the entire argument, and not only isolated sentences. *See Castillo v. State*, 939 S.W.2d 754 (Tex. App.--Houston [14th Dist.] 1997, pet. ref'd). The jury was aware of appellant's gang affiliation, as well as his criminal record. Therefore, the State did not make a huge leap by insinuating that appellant might kill again if given probation.

The cross-examination questions and first argument appellant complains about were not properly preserved for appellate review. The second argument was a proper plea for law enforcement, and, alternatively, was not manifestly improper in light of the record as a whole. Accordingly, appellant's first point of error is overruled.

**II. Prejudicial Cross-Examination of Appellant**

In his second point of error appellant complains about a portion of the State's cross-examination during the guilt/innocence phase of trial. Specifically, appellant points to the following line of questions propounded to appellant:

> Q: Can you tell this court whether or not any of the holes found in these photographs were cause by your shots?
>
> A: No, sir.
>
> DEFENSE: Your Honor, I would object to the question on the grounds that he has no personal knowledge.
>
> THE COURT: Overruled. Go ahead.
>
> Q: Do you know if you caused those?
>
> A: No, sir.
>
> Q: If you did, you were wrong, right? You shouldn't have hit that car?
>
> DEFENSE: I'm going to object to that as a conditional question. He's already said he doesn't know the answer to the first part.
>
> THE COURT: Overruled.
>
> Q: You shouldn't have been shooting at this car, should you have?
>
> A: What car?
>
> Q: The second Suzuki, or Geo Tracker, whatever it is?

A: Yes, sir.
Q: So, if these are bullet holes that you caused, that was wrong?
A: Yes —

DEFENSE: Object to the vagueness and badgering the witness as to, "that was wrong."

THE COURT: Overruled. Go ahead.

Appellant argues that this line of questioning was prejudicial and that *any* answer would have given the jury the impression he was guilty.

To preserve error for appellate review, an appellant must have made a specific, timely objection at the earliest possible opportunity. *See Broxton*, 909 S.W.2d at 918; *Burks*, 876 S.W.2d at 899; *Turner*, 805 S.W.2d at 431; TEX. R. APP. P. 33.1(a).The point of error on appeal must correspond to the objection made at trial. *See Broxton*, 909 S.W.2d at 918; *Thomas v. State*, 723 S.W.2d 696 (Tex. Crim. App.1986). In the instant case, appellant's counsel objected to the State's line of questioning on three grounds— no personal knowledge, conditional question, and vagueness, but did not object to the questions as prejudicial. Accordingly, appellant's complaint was not preserved for review because is does not comport with the objections made at trial. *See id.* We overrule appellant's second point of error.

**III. Improper Inclusion of Manslaughter as a Lesser-Included Offense**

In his third point of error, appellant argues the trial court improperly included voluntary manslaughter as a lesser-included offense to the charge of murder. Appellant argues that there was no evidence of sudden passion, and therefore, the jury verdict of guilty on manslaughter was improper.

Voluntary manslaughter can only be considered a lesser-included offense to murder when some evidence of sudden passion exists. *See* TEX. PEN. CODE ANN. § 19.04(a) (Vernon Supp. 1999); *Penry v. State*, 903 S.W.2d 715, 755 (Tex. Crim. App. 1995); *Burns v. State*, 923 S.W.2d 233, 236 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd.). Failure to object to the charge of manslaughter when given on the ground that the evidence does not

support a finding of sudden passion signals acquiescence on the part of the accused that the issue has been sufficiently raised. *See Bradley v. State*, 688 S.W.2d 847, 853 (Tex. Crim. App. 1985); *Brown v. State*, 740 S.W.2d 45, 46 (Tex. App.--Houston [14th Dist.] 1987, no pet.). Appellant did not object to the inclusion of manslaughter in the jury charge, and therefore, waived any challenge to its inclusion on appeal. Accordingly, appellant's third point of error is overruled.

**IV. Misrepresentation of the Law by the State to the Jury**

Appellant complains in his fourth point of error about statements made by the State in closing arguments during the guilt/innocence phase of the trial. Specifically, appellant contends the prosecutor misrepresented the law and points to the following portion of the State's argument:

> A reasonable doubt. What is a reasonable doubt? You've got a definition of it that's kind of circular. What does your heart tell you? What does your gut tell you? That's what reasonable doubt is. That's what proof beyond a reasonable doubt is. I think your heart and gut tell you what happened here. If you follow your heart and your gut, you'll find him guilty of murder and guilty of aggravated assault, because that's what he did.

To preserve error for appellate review, appellant must have made a specific, timely objection at the earliest possible opportunity. *See Cockrell,* 933 S.W.2d at 89; *Almanza,* 945 S.W.2d at 188; TEX. R. APP. P. 33.1(a). Appellant did not object to this portion of the State's closing argument, and consequently, waived any right to challenge the argument on appeal. Appellant's fourth point of error is overruled.

**V. Invalid Verdict of the Jury**

In his fifth point of error, appellant attacks the validity of the jury's verdict based on their written communications with the trial judge during deliberation. Appellant specifically

points to the jurors' request to re-read a portion of his testimony.[4] Appellant argues that the jury's request to re-read the testimony shows the jurors were not paying attention during his testimony, and must have believed he lied on the stand. This false impression, appellant contends, rendered the jury's verdict invalid.

The jury, as the trier of fact, is the sole judge of the credibility of witnesses, and the weight to give their testimony. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992). The jury may choose to believe or disbelieve all or part of any witness' testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). In the instant case, the jury heard appellant's testimony, deliberated, and by its verdict of guilty, chose to disbelieve his explanation of self-defense. A verdict is not invalid simply because the jury deliberates and ultimately chooses to disbelieve certain testimony. Appellant's fifth point of error is overruled.

**VI. Insufficient Evidence of Aggravated Assault**

In his sixth point of error, appellant challenges the legal sufficiency of the evidence to support his conviction for aggravated assault. Appellant argues the State failed to prove all of the elements of the charged offense.

A reviewing court, when examining a conviction for legal sufficiency, will look at all the evidence in the light most favorable to the prosecution. The court will then determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). The reviewing court may not sit as a thirteenth juror and disregard or reweigh the evidence, replacing the jury's findings with its own. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

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[4] There is nothing in the record to indicate that the portion of appellant's testimony requested by the jury was actually read back to them by the court. Therefore, we presume no true disagreement existed between the jurors as to the content of appellant's testimony and the trial court properly declined to allow the jurors to rehear it. *See DeGraff v. State*, 962 S.W.2d 596, 598-99 (Tex. Crim. App. 1998); TEX. CODE CRIM. PROC. ANN. art. 36.28 (Vernon 1981).

The offense of aggravated assault is defined as intentionally, knowingly, or recklessly threatening another person with imminent bodily injury, while using or exhibiting a deadly weapon. *See* TEX. PEN. CODE ANN. § 22.02(a)(2) (Vernon Supp. 1999). A person is guilty of aggravated assault if he commits the offense of assault and uses a deadly weapon. *See Castillo v. State*, 899 S.W.2d 391, 393 (Tex. App.--Houston [14th Dist.] 1995, no pet.). *See also* TEX. PEN. CODE ANN. § 22.01(a) (Vernon Supp. 1999) (definition of assault).

In the instant case, several witnesses testified that appellant fired his rifle at Buck's vehicle. Appellant's girlfriend, Suniga, testified that she saw appellant fire at both Castillo's car and Buck's car. Appellant himself admitted he shot his rifle out the window, although he denied shooting at Buck's vehicle. Martinez, a passenger in Castillo's car, testified that he witnessed someone in appellant's car shoot at Castillo and Buck. Buck also testified that she witnessed someone shoot in her direction out of the passenger window of a car matching the description of the vehicle in which appellant was riding. Viewing all this evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that appellant threatened Buck with imminent bodily harm and used a deadly weapon when he fired his rifle at her vehicle. Accordingly, appellant's sixth point of error is overruled.

## VII. Erroneous Admission of Hearsay Evidence

In his seventh point of error, appellant argues the trial court erroneously admitted hearsay evidence. Specifically, appellant objects to the following exchange, which occurred when the State questioned Victor Martinez, a passenger in Castillo's car, on direct examination during guilt/innocence:

> Q: As they pulled up next to you, the people in the purple car, did they say anything?
>
> DEFENSE: Objection, your Honor, hearsay.
>
> THE COURT: Did they say anything, yes or no. He didn't say what they said. Overruled.
>
> A: Yes.

Q: Okay. What exactly did they say to you?

DEFENSE: Objection, your Honor, hearsay.

STATE: Judge, it's not offered for the truth of the matter asserted, it's not hearsay.

THE COURT: All right. Overruled. Go ahead.

Q: What did they say to you?

A: I don't know. I didn't hear them..

Q: Let me show you your statement.

A: (reviewing document)

Q: Have your had a chance to read that?

A: Yes.

Q: Does that refresh your memory about what those people said?

A: Yes.

Q: What did they say?

A: "What's up?"

Q: Did they say anything else?

A: They had asked what he was looking at.

Q: How did Jessie [the complainant] respond?

A: He just told them, "Nothing."

Q: That's not exactly what he said, is it?

A: I don't remember.

Q: Okay, somebody from the car said, "What's up, what are you looking at?"

'Jessie said, "Man, f--- you. What are you looking at?" The guys in the car said, "What do you want to do? Do you want to do something?" Jessie said, "F--- it. Whatever you want to do." Jessie jumped back.' Do you remember that?

A: Yes.

Assuming that the testimony appellant objects to was inadmissible hearsay, the trial court's decision to allow the testimony was not reversible error. *See* TEX. R. APP. P. 44.2. This testimony actually supported appellant's self defense theory, establishing that Castillo may have instigated the confrontation. We overrule appellant's seventh point of error.

## VIII. Improper Admission of Prejudicial Photographs

Appellant complains, in his eighth point of error, about the admission of several photographs of the deceased, Castillo, into evidence. Specifically, appellant objects to the admission of State's exhibit 1, a photograph of Castillo in front of his birthday cake, and to

State's exhibits 2, 21, and 23, photographs of Castillo's body in the morgue. Appellant argues all of the photographs were irrelevant and prejudicial, and were improperly admitted.

The first photograph to which appellant objects, State's exhibit 1, depicts Castillo with his birthday cake. This exhibit was admitted into evidence without objection. To preserve a complaint for appellate review, an appellant must have made a specific, timely objection at the earliest possible opportunity. *See Broxton*, 909 S.W.2d at 918; *Burks*, 876 S.W.2d at 899; *Turner*, 805 S.W.2d at 431; TEX. R. APP. P. 33.1(a). Because appellant did not object to the admission of State's exhibit 1, he has not preserved this complaint for appellate review. *See id.*

Appellant, however, did object to the admission of State's exhibits 2, 21, and 23, so his complaints concerning the admission of these photographs is properly preserved for appellate review. *See id.* Appellant first disputes the relevancy of State's exhibits 2, 21, and 23.

The decision to admit or exclude photographs is within the sound discretion of the trial court. *See Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997); *Dickey v. State*, 979 S.W.2d 825, 830 (Tex. App.--Houston [14th Dist.] 1998, pet. ref'd). Generally, a photograph is admissible as relevant evidence if verbal testimony as to matters depicted in the photographs is also admissible as relevant evidence. *See Williams*, 958 S.W.2d at 195; *Dickey*, 979 S.W.2d at 830. Photographs of the crime scene help the jury to determine, among other things, the manner and means of the death of the victim, the force used, and sometimes even the identity of the perpetrator. *See Williams*, 958 S.W.2d at 195. In the instant case, the condition of the body and cause of death was previously entered into evidence via the testimony of Dr. Patricia Moore, the associate county medical examiner. The photographs of the deceased were correspondingly relevant to show the manner and means of the victim's death. Therefore, the trial court did not abuse its discretion in determining the photographs to be relevant.

Appellant also objects to State's exhibits 2, 21, and 23 on the grounds that they are unduly inflammatory and prejudicial. Under rule 403 of the Texas Rules of Evidence, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* TEX. R. EVID. 403. Therefore, the trial court must determine whether the probative value of photographs of a murder victim is substantially outweighed by the prejudicial effect. *See Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997). Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will tend to be more probative than prejudicial. *See id.; Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990). In weighing the probative value and the prejudicial effect of photographs, a court may consider several factors, including: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up, and whether the body depicted is naked or clothed. *See Williams*, 958 S.W.2d at 195; *Long*, 823 S.W.2d at 271.

State's exhibit 2 is the official medical examiner's photo, a chest-up, black-and-white view of the deceased measuring approximately four-by-six inches, with the medical examiner's case number board covering most of the chest. State's exhibit 21 is approximately eight-by-ten inches in size, and is a black-and-white close-up of the side of the deceased's head. State's exhibit 23 is also eight-by-ten inches, black-and-white, and depicts the head-and-shoulders view of the deceased's body.[5] Each exhibit shows different angles of injuries inflicted upon the deceased. The body of the deceased is mostly covered by a sheet, and there is little blood visible. The photos are not particularly gruesome or bloody. *See Williams*, 958 S.W.2d at 196; *Sonnier*, 913 S.W.2d at 519. The photos do show short tubes protruding from the deceased's nose; however any prejudice resulting from

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[5] We note that the photographs included in the appellate record are black and white photocopies of the originals. If the original photographs were color and appellant believed this would impact the court's decision, the burden was on appellant to ensure that either the original photos or color photocopies were included in the record. *See Williams*, 958 S.W.2d at 196 n.10; TEX. R. APP. P. 34.6(d).

the tubes in the photos does not substantially outweigh the probative value of the photographs.

We find that State's exhibits 2, 21, and 23 are few in number, depict the actual wounds inflicted upon the victim, are not overly gruesome or bloody, and are supported by testimony at trial. Therefore, the trial court did not abuse its discretion in admitting the photographs. Accordingly, appellant's eighth point of error is overruled.

**IX. Ineffective Assistance of Counsel**

The proper format for deciding claims of ineffective assistance of counsel at both the guilt/innocence and punishment phases is the two-prong standard adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).[6] Texas adopted this standard in *Hernandez v. State*, 726 S.W.2d 53, 56-7 (Tex. Crim. App. 1986). In *Strickland*, the Court held that an appellant must first show that defense counsel's performance was deficient, such that the errors made were so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment of the United States Constitution. *See Strickland*, 466 U.S. at 687. The proper standard of effectiveness will be an objectively reasonable standard, taking into account all the surrounding circumstances. *See id.* at 688. In addition, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See id*. at 690.

Under the second prong of the *Strickland* standard, an appellant must show that the deficient performance prejudiced the defense, in that counsel's errors were so serious as to deprive the defendant of a fair trial whose result was reliable. 466 U.S. at 687. Thus, an appellant must demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See id.* at 694.

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[6] *See Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999).

An appellant must satisfy both prongs of the *Strickland* standard, demonstrating both deficiency and prejudice, otherwise the conviction cannot be said to have "resulted from a breakdown in the adversary process that renders the result unreliable." *Id*. at 687.

Appellant points to four different instances in which his counsel allegedly rendered ineffective assistance. Appellant argues these errors, when combined, were so serious as to deprive him of a fair trial as guaranteed in the Sixth Amendment to the United States Constitution. *See* U.S. CONST., AMEND. VI.

The first instance appellant points to is his attorney's failure to object to pictures of the deceased, Castillo, when they were introduced into evidence. Appellant argues that the photos of Castillo in the morgue, coupled with a photo of him in front of his birthday cake were inadmissable and prejudicial, and his counsel's failure to object to them amounted to ineffective assistance.

First, contrary to appellant's argument, his counsel did object to the admission of the morgue photographs, but his objections were properly overruled by the trial court. Second, although counsel did not object to the photograph of Castillo with his birthday cake, we find the photograph was admissible. *See* TEX. R. EVID. 403. A photograph depicting the deceased while alive is relevant for in-court identification purposes because a photograph is competent evidence of any subject about which a witness' description is proper. *See Williams*, 958 S.W.2d at 195; *Dickey*, 979 S.W.2d at 830.

Appellant next argues that counsel's failure to object to the State's closing arguments during both guilt/innocence and punishment rendered his assistance ineffective. Specifically, appellant argues that counsel should have objected when the State offered the following argument during guilt/innocence: "If you will imagine the Crip Cartel Guide to a Killing (indicating), written by Little Man. It even has before and after photos. Little Man's guide to a killing before, Little Man's guide to a killing after. Don't let him write that book." Appellant also believes counsel should have objected to the State plea that the

jury "protect the citizens of Harris County from people like him" during the punishment phase. Appellant argues these arguments were improper and counsel should have objected. We find, however, that both arguments were proper pleas for law enforcement. *See Felder*, 848 S.W.2d at 94-95. Thus, appellant's counsel was not ineffective for failing to object.

Finally, appellant points to his attorney's failure to object to certain questions propounded to appellant by the State during cross-examination in the punishment phase. During its cross-examination of appellant, the State asked appellant whether he had smiled at friends and family of the deceased in the elevator during the trial. Appellant argues this line of questioning was irrelevant and prejudicial, and his counsel should have objected. We find, however, that the State's questions were permissible under the circumstances.

Generally, a witness may not be impeached on a collateral matter which the cross-examining party is not entitled to prove as a part of the case-in-chief. *See Ramirez v. State*, 802 S.W.2d 674, 675 (Tex. Crim. App. 1990). However, "when an accused testifies gratuitously as to some matter that is irrelevant or collateral to the proceeding, as with any other witness he may be impeached by a showing that he has lied or is in error as to that matter." *Hammett v. State*, 713 S.W.2d 102, 105 (Tex. Crim. App. 1986). *See also House v. State,* 909 S.W.2d 214, 216 (Tex. App.–Houston [14 Dist.] 1995), *aff'd*, 947 S.W.2d 251 (Tex. Crim. App. 1997). The prosecutor's questions were in direct rebuttal to appellant's previous assertions on direct examination that he felt very sorry for what he had done to the Castillo family. *See, generally, R.X.F. v. State*, 921 S.W.2d 888, 902 (Tex. App.-Waco, 1996, no writ). Therefore, it was not ineffective for appellant's counsel to fail to object to this cross-examination by the State.

Appellant has failed under the first prong of *Strickland* to establish that defense counsel performed deficiently during the course of the trial. In all of the instances appellant points to, the State's actions were proper and supported by law. Therefore, it was not error for appellant's counsel to fail to object. Furthermore, counsel's performance appeared to

have been instrumental in the jury's decision to convict appellant of the lesser-included charge of manslaughter, rather than murder. Thus, appellant has not satisfied *Strickland* by demonstrating that in light of the record as a whole, defense counsel's performance was so deficient as to deprive him of a fair trial. Accordingly, appellant's ninth point of error is overruled.

## X. Failure of the Trial Court to Give Appellant a Complete Copy of the Trial Record

Appellant asserts in his tenth and final point of error that the trial court failed to provide him with a complete copy of the record of his trial. Appellant filed a motion to obtain the trial record on April 12, 1999. On April 22, 1999, this court contacted the district court and determined that appellant had, in fact, received the full and complete record from the trial. We ruled appellant's motion was moot, and for the same reason, now overrule his tenth point of error.

Having overruled all of appellant's points of error, we affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed October 28, 1999.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
Do Not Publish — TEX. R. APP. P. 47.3(b).