IN THE COURT OF APPEALS
STATE OF GEORGIA

DOCKET № A23A0670

DANIEL BRUCE FRANZ, II,
APPELLANT,

v.

STATE OF GEORGIA,
APPELLEE.

BRIEF OF APPELLEE

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IN THE COURT OF APPEALS
STATE OF GEORGIA

DANIEL BRUCE FRANZ, II, APPELLANT,	DOCKET № A23A0670
V.	ON APPEAL FROM HOUSTON COUNTY SUPERIOR COURT
STATE OF GEORGIA APPELLEE.	LOWER COURT № 2018-C-52386

BRIEF OF APPELLEE
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INTRODUCTION

In a deliberate and cowardly act of violence, Daniel Franz shot and killed Vincent Junior after a heated dispute over a bag of marijuana. On appeal, Franz presents this Court with three overarching issues:

- **Sufficiency of the evidence**. A conviction should be upheld if the record contains some competent evidence, even though contradicted, to support each element of the charged offense. Here, Franz shot Junior three times after an intense argument about marijuana. Franz was not under an imminent threat of violence or acting to prevent a forcible felony. Also, he was committing a felony when he shot Junior, by possessing a gun as a convicted felon. Was the evidence sufficient to support the voluntary manslaughter conviction and disprove self-defense?

- **Plain error as to jury charges**. A failure to charge may amount to plain error where the failure was erroneous, the error is obvious, the failure likely affected the trial outcome, and it seriously impacts the integrity of judicial proceedings. The trial court gave jury instructions on self-defense as called for by the evidence. Did the trial court plainly err in its jury charges?

- **Ineffective assistance of counsel**. To prove ineffective assistance, a defendant must show: (1) his trial counsel performed in an objectively deficient manner and (2) counsel's representation prejudiced him. Here, Franz was acquitted of murder. Did trial counsel render ineffective assistance in his investigation, objections at trial, and unrequested jury instructions?

As developed more fully below, Franz's arguments lack merit to authorize reversal on appeal. Franz, a convicted felon, fatally shot Junior multiple times not to ward off an armed robbery but rather in a calculating fashion. Franz does not meet his high bar to establish the trial court plainly erred in its jury charges on self-defense where the court tailored its charge to the evidence. Lastly, Franz does not show how trial counsel performed deficiently nor any prejudice from counsel's supposed errors. Thus, the State asks this Court to AFFIRM Franz's conviction and UPHOLD the trial court's ruling denying his motion for a new trial.

FACTUAL CLARIFICATION

On January 13, 2018, Warner Robins police officers responded to Tanglewood Apartments, 1005 Elberta Road, apartment number 90, in reference to shots fired.[1] Two witnesses, Devona Robinson and Antwon Phelps, observed what transpired in the apartment.

Around 5:00 P.M., Devona Robinson went to Tanglewood apartment number 90 to braid hair.[2] She knew Daniel Franz, who was hanging out in the apartment.[3] Vincent Junior showed up at the apartment after Franz and they began arguing in the living room about a marijuana blunt Franz had.[4] During the argument, Robinson did not see Junior with a handgun.[5] Robinson did observe Junior lift his shirt but could not see if he was concealing anything because she stood behind him.[6] The argument escalated with Franz vacating the living room and going into the kitchen.[7] Junior followed Franz into the kitchen, and they continued to argue.[8]

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[1] T: 79; St Ex: 1.
[2] T: 136.
[3] T: 135, 137-38.
[4] T: 138-39.
[5] T: 140, 149, 151; *Compare* App't Br: 9 ("It was undisputed that Mr. Junior had a gun at some point and threatened Mr. Franz with it"). This is one of the several inaccuracies in Franz's statement of facts.
[6] T: 150-51; *Compare* App't Br: 9 ("Mr. Junior threatened Mr. Franz and lifted his shirt to show a gun to Mr. Franz") (referencing Robinson's testimony).
[7] T: 140.
[8] T: 140, 149.

Robinson did not see what transpired in the kitchen.[9] Franz left the kitchen and went into a bedroom with Junior following him.[10] Junior then stepped back into the hallway adjacent to the living room holding a baggie of marijuana.[11] Junior bragged to the other apartment guests about taking the marijuana from Franz.[12] Junior walked back into the hallway and continued to argue with Franz, who was still in the bedroom.[13] Robinson then heard multiple gun shots.[14] According to Robinson, "It seemed like it all happened in seconds."[15]

She saw Franz flee from the apartment while carrying a backpack.[16] She then called 911.[17] Robinson selected Franz out of a police lineup as the shooter.[18] Robinson characterized Junior as the aggressor in the matter with Franz.[19] Robinson heard Junior tell Franz that Franz was not going to leave the apartment "without an ass whooping."[20] Robinson felt Junior bullied Franz.[21]

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[9] T: 149, 155.
[10] T: 140.
[11] T: 140, 155.
[12] T: 140-41, 149, 155.
[13] T: 141, 151, 155.
[14] T: 141, 153.
[15] T: 154, 156; *Compare* App't Br: 9 ("The incident took place in a matter of seconds").
[16] T: 142.
[17] T: 142.
[18] T: 147.
[19] T: 148.
[20] T: 150.
[21] T: 157-58.

Antwon Phelps also witnessed the shooting. He went to Tanglewood apartment number 90 to visit a friend.[22] He also knew Franz.[23] Phelps briefly went to his apartment in the same complex to get some movies.[24] Junior arrived shortly after he returned with the movies.[25] Franz was in the living room, sitting on an air mattress with a handgun next to him.[26] Phelps heard Junior ask Franz for a "sack" of marijuana.[27] When he refused, Franz and Junior started arguing in the living room with both men flashing their respective firearms.[28] Phelps told them to calm down.[29]

Franz tried to get away from Junior.[30] Franz took his book bag and marijuana blunt and went into the kitchen.[31] Junior told Phelps he was going into the kitchen to take Franz's marijuana.[32] Junior followed Franz into the kitchen with his gun drawn and returned with one gram of marijuana.[33] Up to four minutes expired from the time Junior went into the kitchen to the time he returned to the living room.[34]

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[22] T: 163.
[23] T: 163, 173.
[24] T: 165.
[25] T: 165, 174.
[26] T: 166, 174.
[27] T: 165-66, 178.
[28] T: 166, 179.
[29] T: 166.
[30] T: 179.
[31] T: 166.
[32] T: 166.
[33] T: 166, 180.
[34] T: 181.

Phelps testified: "I don't know what happened in the kitchen, but when he came back he, he had it. He had took it from Danny."[35] Junior then came back out of the kitchen with the marijuana and "put his gun back on him."[36]

Phelps next saw Franz emerge from the hallway into the living room, with a look in his eyes "that something wasn't right."[37] Franz stood behind Junior, motioned for Phelps to "get out the way," and fired a shot from a distance at Junior, striking Junior in the back shoulder.[38] Junior's body spun around.[39] He reached for his gun and charged at Franz, who shot at him again four times.[40] After shooting Junior, Franz fled from the apartment.[41] Franz's fingerprints were found on a plastic Fanta bottle and cigar wrapper collected at the apartment.[42] No firearms were left behind at the scene.[43]

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[35] T: 166.
[36] T: 180, 183.
[37] T: 167.
[38] T: 167-69, 181.
[39] T: 167-69, 181.
[40] T: 167-69, 181.
[41] T: 169.
[42] T: 109-12, 220-22; St Ex: 71, 72, 73, 74, 91.
[43] T: 117.

Officers found Junior's lifeless body lying in the hallway.[44] The GBI medical examiner testified that Junior suffered three gunshot wounds.[45] One bullet struck his front lower chest and traveled left to right in downward direction.[46] The doctor opined Junior may have been turning his body at the time of impact.[47] Junior had two gunshot wounds to his back, which pierced the lungs and the heart.[48]

Five .380 caliber casings rested near Junior's body.[49] The crime scene investigator recovered three bullets from the east facing wall of the living room.[50] The medical examiner recovered two projectiles from inside Junior's body and submitted them for examination.[51] The firearms examiner indicated both .380 caliber bullets were fired from the same handgun.[52] The shell casings found on scene were also .380 caliber cartridges and fired from the same firearm.[53]

Additional facts may be included as necessary to address Franz's enumerations of error.

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[44] T: 80.
[45] T: 192.
[46] T: 192-93.
[47] T: 193, 203.
[48] T: 193.
[49] T: 105, 116; St Ex: 63-67.
[50] T: 107-08, 117; St Ex: 68-70.
[51] T: 196; St Ex: 90.
[52] T: 210.
[53] T: 211-13; St Ex: 63-67.

ARGUMENT AND CITATION OF AUTHORITY

Franz lists three enumerations of error summarized as follows: (1) the evidence was insufficient to support his conviction for voluntary manslaughter; (2) the trial court committed plain error in its jury instructions; and (3) trial counsel rendered ineffective assistance. The State will address each of Franz's contentions in turn, along with his unenumerated claim of cumulative error.

I. The trial evidence was sufficient to support Franz's conviction for voluntary manslaughter and disprove his self-defense claim.

Franz's first enumeration of error challenges the sufficiency of the evidence supporting his voluntary manslaughter conviction.[54] As an initial matter, in asserting the conviction was "decidedly and strongly against the weight of the evidence,"[55] Franz confuses the proper legal standard as to a review of the evidence on appeal. He alludes to the general grounds for a new trial under OCGA §§ 5-5-20 and 5-5-21 and not the standard set forth in *Jackson v. Virginia*.[56] But these comprise "two distinct legal arguments," subject to different legal standards.[57]

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[54] In his argument, Franz does not mention the possession of a firearm by a convicted felon charge and so has waived any challenge to the sufficiency of the evidence as to that conviction. *See, e.g.*, *McBee v. State*, 296 Ga. App. 42, 46, 673 S.E.2d 569, 572 (2009).
[55] App't Br: 13, 15.
[56] 443 U.S. 307 (1979).
[57] *Casey v. State*, 310 Ga. 421, 425, 851 S.E.2d 550, 554 (2020).

Ultimately, an appellate court limits its review of the legal sufficiency of the evidence to the *Jackson v. Virginia* standard.[58] As articulated below, the evidence at trial was sufficient to uphold Franz's conviction and disprove his self-defense claim.

A) Applicable Law & Standard of Review

The sufficiency-of-the-evidence standard under *Jackson v. Virginia* is "whether the evidence presented at trial, when viewed in the light most favorable to the verdict, was sufficient to authorize a rational jury to find the appellant guilty beyond a reasonable doubt of the crimes of which he was convicted."[59] The jury exclusively assesses the credibility of witnesses and resolves any conflicts in the evidence.[60] Moreover, a conviction need not rest on any particular type of evidence: "[I]t is of no consequence that the State did not adduce physical evidence – such as DNA evidence or fingerprints – connecting [Franz] to the crime."[61] This Court must uphold the jury's verdict so long as the record contains "some competent evidence, even though contradicted, to support each fact necessary to make out the State's case."[62]

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[58] *See, e.g.*, *Cotton v. State*, 297 Ga. 257, 258, 773 S.E.2d 242, 244 (2015); *Allen v. State*, 296 Ga. 738, 741, 770 S.E.2d 625, 628 (2015).
[59] *Gittens v. State*, 307 Ga. 841, 842, 838 S.E.2d 888, 891 (2020).
[60] *See Graves v. State,* 298 Ga. 551, 553, 783 S.E.2d 891, 893 (2016).
[61] *Gittens*, 307 Ga. at 842.
[62] *Johnson v. State*, 296 Ga. 504, 505, 769 S.E.2d 87, 90 (2015).

B) Franz purposefully shot Junior multiple times after Junior took Franz's marijuana.

The crime of voluntary manslaughter is committed when a person "causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person."[63] This provocation may take the form of "heated arguments, physical beatings, and fear of some danger."[64] In this case, the State bore the burden of not only proving Franz guilty of voluntary manslaughter beyond a reasonable doubt, but also disproving his claim of self-defense by that same standard.[65] Fundamentally, the existence of self-defense presents a jury question, and "the jury may reject any evidence in support of a justification defense and accept evidence that a shooting was not done in self-defense."[66]

Here, the testimony from the two eyewitnesses, Devona Robinson and Antwon Phelps, proved paramount. Both witnesses testified how Junior provoked and antagonized Franz over some marijuana. They both indicated the argument over the marijuana became heated, with Phelps adding that both men flaunted their respective firearms. Both witnesses recalled how Franz fled from the living room to the kitchen to

[63] OCGA § 16-5-2(a).
[64] *Jennings v. State*, 363 Ga. App. 170, 173, 869 S.E.2d 93, 96 (2022).
[65] *See Pritchett v. State*, 314 Ga. 767, 770, 879 S.E.2d 436, 442 (2022).
[66] *Gibbs v. State*, 309 Ga. 562, 564, 847 S.E.2d 156, 159 (2020).

get away from Junior and that Junior followed him. Robinson and Phelps relayed how Junior came out of the kitchen holding a bag of marijuana and bragged about having taken it from Franz.

As for the events culminating in the shooting, both witnesses stated Franz retreated from the kitchen into the hallway leading to a bedroom. According to Robinson, Junior followed Franz into the hallway and continued arguing with him. She then heard several gun shots. Per Phelps's recollection, Franz emerged from the hallway with a determined look in his eyes and motioned for Phelps to get out of the way. Phelps also recalled that Franz first shot Junior in the back shoulder and from a distance. The impact of the bullet caused Junior's body to spin towards Franz, who shot at Junior four more times. After killing Junior, both witnesses saw Franz flee from the apartment.

When viewed in the light most favorable to the verdict, the evidence presented at trial was sufficient for the jury to convict Franz of voluntary manslaughter. It is undisputed that Franz shot and killed Vincent Junior. The jury was free to find that the heated argument between the two men and Junior's theft of Franz's marijuana amounted to sufficient provocation to reduce the unlawful killing from murder to voluntary manslaughter. Franz's argument that the evidence presented "no scenario at law which would suggest that the shooting was anything other than justifiable"[67] lacks merit and his conviction should stand.

[67] App't Br: 16.

C) Franz did not act in self-defense when he killed Junior.

A person may use force against another when and to the extent that he reasonably believes that such force is necessary to defend himself against such other's imminent use of unlawful force or to prevent a forcible felony.[68] Yet a person is not justified in using force, in relevant part, where he "is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony."[69] And a justification claim cannot stand where a person uses excessive force to defend himself: "Conduct cannot be justified as self-defense if the amount of force used by the person to defend himself or herself is excessive."[70] Franz's claim of self-defense fails for any number of reasons. Because Franz:

(1) was not protecting himself from Junior's imminent use of unlawful force;

(2) did not act to prevent the commission of a forcible felony;

(3) was committing a felony when he shot Junior by possessing a handgun while a convicted felon; and

(4) used excessive force by shooting Junior three times over a bag of marijuana,

justification by self-defense was not available to him.

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[68] *See* OCGA § 16-3-21(a).
[69] OCGA § 16-3-21(b)(2).
[70] *Aeger v. State*, 356 Ga. App. 667, 671, 848 S.E.2d 677, 681 (2020) (citation and punctuation omitted).

First, the evidence showed Franz shot Junior in a calculating manner and not to stave off Junior's imminent use of unlawful force. Franz's faulty premise that he was the "victim of an armed robbery"[71] is repudiated by the record. Both eyewitnesses testified how Junior followed Franz into the kitchen to take his bag of marijuana. Devona Robinson repeatedly denied seeing Junior with a gun when he went after Franz. In comparison, Antwon Phelps did observe Junior yield a gun when he went into the kitchen. Yet *neither witness saw what happened* in the time Franz and Junior were in the kitchen together. The evidence of an armed robbery was hardly "undisputed" and "uncontroverted."[72] Robinson and Phelps testified as follows:

> **Devona Robinson**
>
> Q: Okay, and he got the sack from Danny?
>
> A: Apparent – in the kitchen.
>
> Q: Okay.
>
> A: *I couldn't see in there.*
>
> . . .
>
> Q: All right, can you use your pointer and tell me where it started in the kitchen.
>
> A: *I couldn't see in the kitchen so I don't know.*

[71] App't Br: 7, 15-17.
[72] App't Br: 7, 15.

> . . .
>
> **Antwon Phelps**
>
> A: [Junior] was like, I'm fixing to go back there and take it from him, I'm fixing to show you. I'm fixing to go back there and take it. So [Junior] pulled out his gun and walked back there to the kitchen. *I don't know what happened in the kitchen*, but when he came back he, he had it.[73]

Phelps also indicated that Junior returned to the living room with the marijuana bag and "put his gun back on him."[74] Only then did Franz shoot Junior. And Robinson never saw Junior with a gun.[75] Under either version of events, Franz purposefully shot Junior with an intent to kill, not to prevent an imminent use of unlawful force.

Second, neither was the inferred armed robbery "ongoing,"[76] a characterization of the evidence the trial court denounced as a "misstatement."[77] Some time elapsed from when Junior emerged from the kitchen with the bag of marijuana to when Franz fatally shot him. Both eyewitnesses recounted how Junior bragged about taking the marijuana. Robinson testified that Junior stepped back into the hallway and continued arguing with Franz, who then shot Junior.

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[73] T: 149, 155, 166 (emphasis added).
[74] T: 180, 183.
[75] T: 140, 149, 151.
[76] App't Br: 16.
[77] R: 153.

Phelps observed Franz appear from the hallway, motion for Phelps to move, and shoot Junior from a distance.[78] As the trial court recognized, the armed robbery, if it occurred, was over.[79] The jury rightly rejected Franz's claim of self-defense where he acted not to ward off an imminent violent threat nor to prevent the commission of a forcible felony.[80]

Third, even if Franz had shot Junior to prevent a forcible felony, Franz still could not properly claim self-defense when he was committing a felony at the time he shot and killed Junior. OCGA § 16-3-21(b)(2) provides that a person is not justified in using force where he "is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony." In a seminal opinion interpreting this statute, the Supreme Court of Georgia, in *Woodard v. State*,[81] held that a defendant cannot claim self-defense when he commits *any* felony, including possession of a firearm by a convicted felon.[82] At trial, the State introduced a certified copy of Franz's prior felony conviction.[83] As noted above, Franz does not dispute his conviction here for possession of a firearm by a convicted felon. Thus, Franz's reliance on the self-defense statute to justify his killing of Junior is unwarranted.

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[78] T: 167-68.
[79] R: 154.
[80] *See Howard v. State*, 298 Ga. 396, 398, 782 S.E.2d 255, 258 (2016).
[81] 296 Ga. 803, 771 S.E.2d 362 (2015).
[82] *Woodard*, 296 Ga. at 809-10; *See* OCGA § 16-11-131(b).
[83] T: 315; St Ex: 92. The conviction was for entering auto.

Fourth, even if Franz could avail himself of justification by self-defense, the evidence showed that Franz used excessive force. According to Phelps, Junior faced away from Franz when Franz shot him in the back.[84] Although Junior was wounded and had not unleashed his firearm, Franz shot at him four more times, striking him twice.[85] All this over one gram of marijuana.[86] Under this scenario, the jury was authorized to conclude that Franz displayed excessive force in killing Junior.

D) Franz has no legitimate defense of property claim.

Equally unavailing is Franz's contention that a defense of property justified him fatally shooting Junior. Once again, the statute in question undermines Franz's claim. A person is justified in using force against another if he reasonably believes that such force is necessary to prevent or terminate trespass or other criminal interference with, in relevant part, personal property "*[l]awfully* in his possession."[87] Franz delicately refers to the personal property at issue here as "items," "something," and "property."[88] These benign terms aside, the personal property Franz killed Junior over was marijuana.

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[84] T: 167-69.
[85] T: 167-69.
[86] T: 166.
[87] OCGA § 16-3-24(a)(1) (emphasis added).
[88] App't Br: 9.

At last check, the possession of marijuana in Georgia at the time of trial, and today, is illegal.[89] Because Franz could not lawfully possess marijuana, his reliance on the defense of property statute fails. Moreover, even if Franz could legally possess marijuana, the evidence showed he did not fatally shoot Junior to (1) prevent the commission of (2) a forcible felony.[90] As discussed above, the armed robbery, if it happened, was completed by the time Franz shot Junior.[91]

II. The trial court did not commit plain error in its jury instructions.

A) Applicable Law & Standard of Review

Franz alleges the trial court plainly erred in its jury charge on justification by giving "insufficient," and "confusing" instructions that "did not comport with the law."[92] To start with, Franz improperly shoehorns four isolated errors by the court under this one enumeration of error.[93] A basic principle of law maintains that "error argued in the brief but not enumerated as error will not be considered on appeal."[94]

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[89] *See* OCGA § 16-13-30(j)(1).
[90] *See* OCGA § 16-3-24(b).
[91] Franz does not cite to a single factually similar case to support his assertion that an armed robbery is "ongoing" after the property has been confiscated and the assailant has put away his firearm. His reliance on a murder case in *Jordan v. State*, 293 Ga. 619 (2013), is misplaced.
[92] App't Br: 17.
[93] *See* App't Br: 17-18. These include failure to charge on: (1) forcible felonies; (2) mistake of fact; (3) reckless conduct; (4) involuntary manslaughter.
[94] *Anfield v. State*, 188 Ga. App. 345, 345, 373 S.E.2d 51, 52 (1988).

The State posits that Franz has waived these claims where he failed to individually enumerate each contention as error.

Because trial counsel did not object to the jury instructions, the alleged trial court error should be reviewed for plain error only.[95] Franz has a steep hurdle to clear here as the "bar for plain error is a high one."[96] Franz must establish four elements for this Court to consider a reversal. A failure to charge may rise to the level of plain error when: (1) the failure is erroneous and not affirmatively waived by the appellant; (2) the error is clear or obvious; (3) the failure to charge likely affected the outcome of the trial; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.[97] And "[appellate courts] need not analyze all of the elements of [the plain error] test when … the defendant has failed to establish one of them."[98]

Jury instructions "must be adjusted to the evidence" and comprise a full and correct statement of law.[99] Whether sufficient evidence appears "to authorize the giving of a charge is a question of law."[100] On review, jury charges should be reviewed "as a whole."[101]

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[95] *See* OCGA § 17-8-58(b).
[96] *Taylor v. State*, 365 Ga. App. 30, 32, 877 S.E.2d 286, 288 (2022).
[97] *See State v. Kelly*, 290 Ga. 29, 33, 718 S.E.2d 232, 235–36 (2011) (citation and punctuation omitted).
[98] *Jones v. State*, 314 Ga. 466, 469, 877 S.E.2d 568, 571 (2022).
[99] *Tepanca v. State*, 297 Ga. 47, 49, 771 S.E.2d 879, 882 (2015).
[100] *Tidwell v. State*, 312 Ga. 459, 463, 863 S.E.2d 127, 131 (2021).
[101] *Woodard v. State*, 296 Ga. 803, 806–07, 771 S.E.2d 362, 366 (2015).

Here, the trial court did not err, let alone plainly err, in its charge to the jury on justification. As the trial court noted, the presumed armed robbery was not in progress or ongoing when Franz shot Junior multiple times.[102] The evidence showed Franz did not shoot to ward off an imminent violent attack nor to prevent a forcible felony. Even if Franz had acted under these circumstances, he unjustifiably used force because he was a convicted felon in possession of a firearm, a felony. As discussed, the defense of property charge was also unsuited where Franz unlawfully possessed the infringed personal property, the marijuana.

Given the evidence, the trial court committed no clear or obvious error in its jury charges. Moreover, the court properly instructed the jury on the concepts of presumption of innocence, burden of proof to disprove self-defense, credibility of witnesses, mutual combat, and the charge of voluntary manslaughter. There being no glaring error in the jury instructions as a whole, this Court should deny Franz's request for reversal on this ground.

[102] *See* R: 153-54.

III. Franz did not receive ineffective assistance of counsel.

A) Applicable Law & Standard of Review

On a claim of ineffective assistance of counsel, a defendant must show: "(1) his attorney's representation in specified instances fell below an objective standard of reasonableness *and* (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[103]

To establish deficient performance, Franz must show trial counsel executed his duties "in an objectively unreasonable way, considering all the circumstances and in the light of prevailing professional norms."[104] This is not easily done as there exists "a strong presumption that counsel performed reasonably, and [Franz] bears the burden of overcoming this presumption."[105] An ineffective assistance claim can only survive the first prong and proceed to the prejudice analysis where the evidence shows that trial counsel performed so unreasonably "that no competent attorney would have made the decision under the circumstances."[106]

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[103] *Williams v. State*, 258 Ga. 281, 286, 368 S.E.2d 742 (1988) *quoting Strickland v. Washington*, 466 U.S. 668, 695-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (emphasis in original) (punctuation omitted).
[104] *Bates v. State*, 313 Ga. 57, 62, 867 S.E.2d 140, 146 (2022).
[105] *Davis v. State*, 299 Ga. 180, 183, 787 S.E.2d 221, 226 (2016) (punctuation omitted).
[106] *Sullivan v. State*, 308 Ga. 508, 511, 842 S.E.2d 5, 9 (2020) (citation omitted).

To show prejudice, "[Franz] must demonstrate a reasonable probability of a different result, which is a probability sufficient to undermine confidence in the outcome."[107] This standard likewise amounts to a substantial burden to overcome.[108] Moreover, *Strickland* prejudice cannot be proved by "[m]ere speculation" of harm.[109]

If upon review of the evidence this Court concludes Franz has not met one prong of the *Strickland* test, "[the Court] need not examine the other."[110] As for the trial court's findings of fact in the context of an ineffective assistance claim, this Court is to apply the legal principles to the facts independently while extending "great deference" to credibility determinations made by the trial court unless clearly erroneous.[111]

To clarify matters, the State will consolidate Franz's assorted complaints into three main categories: (1) failure to investigate; (2) failure to object; and (3) failure as to the jury instructions. The following discussion is cast in the context of trial counsel having won acquittals at trial for malice murder, felony murder, and aggravated assault.

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[107] *Davis*, 299 Ga. at 183 (citation and punctuation omitted).
[108] *See Keller v. State*, 308 Ga. 492, 496, 842 S.E.2d 22, 28 (2020).
[109] *Green v. State*, 304 Ga. 385, 391, 818 S.E.2d 535, 541 (2018) (citation and punctuation omitted).
[110] *Draughn v. State*, 311 Ga. 378, 382, 858 S.E.2d 8, 14 (2021) (citation and punctuation omitted).
[111] *Debelbot v. State*, 305 Ga. 534, 540 826 S.E.2d 129 (2019) (*Debelbot* I); *See also Tran v. State*, 340 Ga. App. 546, 550, 798 S.E.2d 71, 76 (2017) (citation and punctuation omitted).

B) Trial counsel was not ineffective in his investigation.

Under the vast umbrella of "failing to subject the State's case to adversarial scrutiny," Franz takes issue with trial counsel's failure to: investigate, call an expert witness, and adequately cross-examine witnesses.[112] Trial counsel did not render ineffective assistance in his investigation or preparing this case for trial.

Defense counsel has a duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, and heavy deference is given to counsel's judgments."[113] Trial counsel testified that he read all the police and crime lab reports and met with Franz over 20 times.[114] He reviewed all the State's photos and videos.[115] Franz did not identify any witnesses for counsel to interview or call at trial.[116] As for discovery, counsel indicated, "I felt I had everything I needed to rep, competently represent Mr. Franz at trial."[117] And as the trial court recognized, "[t]he instant case was not factually complex."[118]

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[112] App't Br: 19-23.
[113] *Bonner v. State*, 314 Ga. 472, 475, 877 S.E.2d 588, 592 (2022).
[114] MNT: 35-36, 50-51.
[115] MNT: 50.
[116] MNT: 36.
[117] MNT: 41. Trial counsel did not take the State's case "as provided in the discovery at face value." *See* App't Br: 19-20. The block quotation on page 11 of Franz's brief is taken out of context. The subject of the discussion prior to counsel's answer had to do solely with obtaining the criminal histories of the State's witnesses. *See* MNT: 38-39.
[118] R: 159.

Regarding the calling of an expert witness, the decision as to which defense witnesses will be called comprises a classic matter of trial strategy and tactics.[119] After conducting his investigation, trial counsel settled on a self-defense strategy, focusing on what "took place before the bullet entered the victim, not after the bullet entered the victim."[120] Trial counsel effectively portrayed Junior as the aggressor, the bully.[121] On appellate review, trial counsel's tactical decision not to call an expert witness at trial is due "substantial latitude."[122]

Concerning the adequacy of counsel's cross-examination, it is well-recognized that "[t]he scope of cross-examination is grounded in trial tactics and strategy, and will rarely constitute ineffective assistance of counsel."[123] Here, trial counsel elicited important concessions from two eyewitnesses, Devona Robinson and Antwon Phelps, that Junior was the aggressor, he followed Franz around the apartment, he had a firearm, and how he was much bigger than Franz. Counsel drew out from the medical examiner, Dr. Maryanne Gaffney-Kraft, that she could not determine if Junior was struck in the back or chest first.[124]

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[119] *See Washington v. State,* 357 Ga. App. 184, 186, 850 S.E.2d 251, 254 (2020).
[120] MNT: 47, 51.
[121] MNT: 51.
[122] *Barnes v. State*, 299 Ga. App. 253, 256, 682 S.E.2d 359, 362 (2009); *See also Birdow v. State*, 305 Ga. 48, 52-53 (2), 823 S.E.2d 736 (2019) (no deficient performance where counsel opted not to call defense expert and instead relied on cross-examination of State's witness to help establish self-defense claim).
[123] *Bonner v. State*, 314 Ga. 472, 476, 877 S.E.2d 588, 593 (2022).
[124] T: 203.

Furthermore, in all respects relative to trial counsel's investigation and preparation, Franz fails to show how he suffered prejudice. As trial counsel recognized, the crux of the case rested on the testimony of the two eyewitnesses, not on any forensic evidence.[125] The trial court expressed skepticism that an expert witness, if called, would have been allowed to testify as to the trajectory of the bullets: "The Court is not convinced anything Doctor Knox had to say was outside the ken of the jurors …."[126] In addition, Franz fails to articulate how evidence of Junior's blood toxicology would have been "exculpatory."[127] Nor does Franz express how a different cross-examination strategy would have served him favorably. At most, Franz offers speculation; he has not established *Strickland* prejudice.

[125] *See* MNT: 67.
[126] R: 159. Dr. Michael Knox, a "crime scene reconstruction expert," testified at the motion for new trial hearing.
[127] App't Br: 10. Franz's assertion that "defense counsel argued that Mr. Junior was on cocaine" is inaccurate. In his opening, trial counsel indicated that Junior "was apparently under the influence of drugs." T: 76.

C) Trial counsel made strategic decisions not to object.

It is well-established that "[t]he decision of whether to interpose certain objections is a matter of trial strategy and tactics."[128] Regarding Junior's in-life photo, Franz conceded that "it is not error to admit a photograph of the victim while in life."[129] Trial counsel stated he "didn't think [the photo] hurt Franz."[130] Any objection by trial counsel, then, would have been meritless. The failure of counsel to make a meritless objection to the admission of evidence at trial is not defective performance.[131] Neither was the testimony about Junior's family life improper or prejudicial. As to this evidence, counsel indicated he had no basis for objecting on character grounds.[132] Besides, Junior was hardly a sympathetic victim. Even the prosecutor had to acknowledge that Junior "was not a saint."[133]

In the same vein, the lack of objection during summation does not comprise deficient performance where the law recognizes that choosing "to remain silent instead of objecting and calling attention to the improper argument constituted reasonable trial strategy."[134] Here, the prosecutor made no ill-advised reference to the law of self-defense.

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[128] *Abernathy v. State*, 299 Ga. App. 897, 903, 685 S.E.2d 734, 741 (2009).
[129] App't Br: 21, *quoting Ledford v. State*, 264 Ga. 60, 66, 439 S.E.2d 917, 924 (1994).
[130] MNT: 63.
[131] *See Wesley v. State*, 286 Ga. 355, 356, 689 S.E.2d 280, 282 (2010).
[132] *See* MNT: 59, 61.
[133] T: 278, 279.
[134] *Benton v. State,* 361 Ga. App. 19, 32, 861 S.E.2d 672, 683 (2021), *rev'd and remanded* on other grounds, 314 Ga. 498, 877 S.E.2d 603 (2022).

He qualified his comments by correctly telling the jury that the law would come from the court: "The Judge is going to instruct you as to self defense …."[135] Trial counsel considered the prosecutor's comments on the law to be his "opinion."[136] Franz experienced no prejudice where the trial court gave the proper jury instructions as conformed to the evidence.

In addition, the prosecutor did not imprudently quote the Bible. He simply noted "a proverb;"[137] not the Bible, the book of Proverbs, the Holy Scriptures, or the Good Book. Trial counsel did not pick up on the reference: "Honestly, I wasn't even aware of the verse, so I probably just, just let it go."[138] And the prosecutor certainly did not invite the jury to render its verdict based on religion. As for prejudice, perhaps King Solomon could divine the harm Franz suffered due to this obscure comment. Franz, however, leaves this Court with no answers.

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[135] T: 272. *See also* T: 269, 273-74.
[136] MNT: 88.
[137] T: 275-76 ("The wicked flee when none pursueth, but the righteous are bold as a lion").
[138] MNT: 89.

D) Franz was not prejudiced by the trial court's jury charges.

Regarding Franz's contention that trial counsel should have requested in writing and objected to the trial court's "inadequate, incomplete, and confusing"[139] jury instructions on justification, the decision not to do so likewise "falls within the realm of trial tactics and strategy."[140] Trial counsel testified that "[a]s long as [the judge] gave the, the charge of self-defense, I was satisfied."[141]

Instead of proving prejudice, Franz again resorts to speculation.[142] But Franz has not shown any harm where the trial court instructed the jury on the concepts of presumption of innocence, burden of proof to disprove self-defense, credibility of witnesses, mutual combat, the charge of voluntary manslaughter, and justification by self-defense. As discussed above, the trial court gave proper jury charges. Any objection by trial counsel would have been meritless: "Counsel cannot be ineffective for failing to make a meritless objection to a proper charge."[143]

Assuredly, Franz has failed to prove either prong of the *Strickland* standard as to all his allegations of ineffective assistance of counsel.

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[139] App't Br: 21.
[140] *Bynum v. State*, 315 Ga. App. 392, 394, 726 S.E.2d 428, 430 (2012).
[141] MNT: 80-81.
[142] *See* App't Br: 7, 19.
[143] *Vergara v. State*, 287 Ga. 194, 198, 695 S.E.2d 215, 219 (2010).

Given the ample evidence of guilt supporting Franz's conviction, it is hard to fathom that any alleged instance of deficient performance prejudiced Franz's defense.[144] Franz not having met his high burden, his ineffective assistance of counsel claim must fail.

IV. No cumulative error exists.

In a one-sentence argument, Franz seeks relief by alluding to the cumulative error doctrine articulated in *State v. Lane*.[145] The types of error in *Lane* apply to evidentiary issues.[146] The Supreme Court of Georgia cautioned future appellants "would do well to explain why the approach that we adopt here should be extended beyond the evidentiary context."[147] Here, Franz does not identify, much less explain, how trial court error over jury instructions and trial counsel's alleged deficiencies entitles him to a new trial. Moreover, Franz's claim is futile where no error by the trial court or counsel appears: "[W]hen reviewing a claim of cumulative prejudice, [appellate courts] evaluate only the effects of matters determined to be error rather than the cumulative effect of non-errors."[148] The cumulative error rule provides Franz no refuge.

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[144] *See, e.g.*, *Kaye v. State*, 341 Ga. App. 846, 851, 801 S.E.2d 922, 927 (2017); *Bynum v. State*, 315 Ga. App. 392, 394, 726 S.E.2d 428, 430–31 (2012).
[145] 308 Ga. 10, 838 S.E.2d 808 (2020); *See* App't Br: 23.
[146] *Lane*, 308 Ga. at 17.
[147] *Lane*, 308 Ga. at 17–18.
[148] *Terrell v. State*, 313 Ga. 120, 131, 868 S.E.2d 764, 774 (2022) (citation omitted).

CONCLUSION

The three questions presented on appeal yield straightforward answers:

- Yes, the trial evidence was sufficient to sustain the voluntary manslaughter conviction and disprove self-defense. Franz, a convicted felon, deliberately shot and killed Junior over a bag of marijuana and not under any imminent threat of harm or to prevent a forcible felony.

- No, the trial court did not commit plain error in its jury charges on self-defense. The court gave complete and correct jury instructions as called for by the trial evidence.

- No, Franz did not receive ineffective assistance of counsel. He failed to prove trial counsel performed deficiently nor did he show prejudice arising from counsel's representation.

The jury rendered a true and just verdict. Thus, the State prays this honorable Court UPHOLD the trial court's order denying Daniel Franz's amended motion for new trial and AFFIRM his conviction.

Respectfully submitted this 18th day of January 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies this submission does not exceed the word count limited imposed by Rule 24.

Dated this 18th day of January 2023.

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IN THE COURT OF APPEALS
STATE OF GEORGIA

DANIEL BRUCE FRANZ, II, APPELLANT, V. **STATE OF GEORGIA** APPELLEE.	DOCKET № A23A0670 ON APPEAL FROM HOUSTON COUNTY SUPERIOR COURT LOWER COURT № 2018-C-52386

CERTIFICATE OF SERVICE

I hereby certify I have this day served the within and foregoing Brief of Appellee by the District Attorney by depositing a copy thereof, postage paid, in the United States mail, properly addressed, upon:

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Respectfully submitted this 18th day of January 2023.

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