In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00148-CR

MICHAEL PAUL HENDRIX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 5th District Court
Cass County, Texas
Trial Court No. 2014-F-00198

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

After both of toddler K.C.'s femurs were broken and he was put in a spica cast that immobilized his hips and legs but allowed space to change his diaper, Michael Paul Hendrix was indicted for causing serious bodily injury to a child, convicted, subjected to sentence enhancement, and sentenced to sixty-five years' imprisonment.[1]

Hendrix' appellate counsel filed a brief that outlined the procedural history of the case, provided a detailed summary of the evidence elicited during the course of the trial court proceedings, and stated that counsel found no meritorious issues to raise on appeal. Meeting the requirements of *Anders v. California*, counsel has provided a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *Anders v. California*, 386 U.S. 738, 743–44 (1967); *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008) (orig. proceeding); *Stafford v. State*, 813 S.W.2d 503, 509–10 (Tex. Crim. App. 1991); *High v. State*, 573 S.W.2d 807, 812–13 (Tex. Crim. App. [Panel Op.] 1978). Counsel also filed a motion with this Court seeking to withdraw as counsel in this appeal. Counsel provided Hendrix with a copy of the brief, the appellate record, and the motion to withdraw. Counsel also informed Hendrix of his right to review the record and file a pro se response.

In response to counsel's *Anders* brief, Hendrix has filed a pro se response in which he claims that it was error to allow testimony, via closed-circuit television, by a non-victim minor witness; that evidence was insufficient to prove the element of serious bodily injury; that his trial

[1]*See* TEX. PENAL CODE ANN. § 22.04 (West Supp. 2016) (Injury to a Child).

counsel was ineffective; and that the indictment's lack of a seal rendered it fundamentally defective.

We affirm the judgment of the trial court, because (1) testimony of the minor, non-victim witness via closed-circuit television was not error, (2) evidence was sufficient to support the jury's finding of serious bodily injury to K.C., (3) ineffective assistance of Hendrix' trial counsel was not established, and (4) indictments need not bear a seal.

(1) Testimony of the Minor, Non-Victim Witness Via Closed-Circuit Television Was Not Error

Hendrix argues that Article 38.071, Section 3, of the Texas Code of Criminal Procedure does not authorize the closed-circuit presentation of the testimony from a non-victim, child witness. *See* TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (West Supp. 2016). While we agree with Hendrix that Article 38.071, Section 3, applies only to child victims who testify, we disagree that the statute's non-applicability to this case ends the discussion and wins Hendrix his appeal.

Lack of specific statutory authorization does not forbid the use of closed-circuit television to present the testimony of non-victim child witnesses in proper circumstances and using proper procedures intended to assure the preservation of confrontation rights. *Gonzales v. State*, 818 S.W.2d 756, 765–66 (Tex. Crim. App. 1991).

> [W]e have found nothing in any pertinent opinion from this Court or from the [U.S.] Supreme Court that would permit only the Legislature to make this "public policy" determination [of whether to allow non-victim child witnesses to testify via closed circuit television] on behalf of the State. Here we recognize that among the general public policy considerations supporting the trial court's actions in the case before us, are: (1) an expressed legislative concern that "seeks . . . [t]o exclude the offender from all hope of escape"; (2) an expressed legislative concern to protect children under similar circumstances; and (3) the expressed affirmation and reaffirmation by the judiciary of this State and the United States that the protection of children is a legitimate and compelling state goal.

Id. (footnote omitted) (citation omitted) (quoting TEX. CODE CRIM. PROC. ANN. art. 1.03) (statutory authorization not required). Of course, specific conditions must be met, to be assured by the trial court's gatekeeping function, but

> if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Maryland v. Craig, 497 U.S. 836, 855 (1990). The use of such remote testimony can be authorized by a trial-court finding that the procedure is needed to prevent significant emotional trauma to the child witness caused by the defendant's presence. *Marx v. State*, 987 S.W.2d 577, 580 (Tex. Crim. App. 1999). That was done here. We overrule this appellate issue.[2]

(2) Evidence Was Sufficient to Support the Jury's Finding of Serious Bodily Injury to K.C.

Hendrix also argues that, because there was little or no evidence as to the length of time K.C. was unable to walk due to his injuries, the evidence is legally insufficient to support a finding that K.C. suffered protracted loss or impairment of his ability to stand or walk, thus undermining the implied jury finding that K.C. sustained serious bodily injury. We disagree.

When the sufficiency of the evidence is challenged on appeal, we are to view it in the light most favorable to the verdict and consider whether a rational fact-finder could have found beyond a reasonable doubt that the challenged element(s) of the offense happened, deferring to the fact-

[2]In a separate point of error, Hendrix argues that the trial court erred in overruling his motion for new trial based on the same child-witness issue. Because of our ruling on his main related point, we also overrule that appellate issue.

finder's role to resolve evidentiary conflicts, to weigh evidence, and to make reasonable inferences from it. *Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016).

While there was conflicting evidence, the State's evidence was that, on or about June 7, 2014, Hendrix hit both of K.C.'s thighs hard, a number of times, with his fisted hand, causing complete breaks to both femurs, resulting in his legs being twisted, unnatural, and unable to support his weight. Medical care was administered, resulting in K.C. being placed in a spica cast, which immobilized his hips and both legs, but left space for his diaper to be changed. Fortunately, at least by April 2015, K.C. had healed and was walking normally again.

That evidence supports a finding of serious bodily injury. While the evidence is not clear concerning the actual length of time K.C. could not walk—it was certainly something *less than* nine months—the complete, separated breaks in both femurs tends to support a finding that he suffered protracted loss or impairment of his ability to stand or walk. *See Williams v. State*, 575 S.W.2d 30, 33 (Tex. Crim. App. [Panel Op.] 1979) (loss of lifting power in an arm for three months, serious bodily injury). An impairment that lasted three months has been held to be protracted. *Kenney v. State*, 750 S.W.2d 10, 12 (Tex. App.—Texarkana 1988, pet. ref'd) (citing *Williams v. State*, 575 S.W.2d 30 (Tex. Crim. App. 1979)).

Regardless of how long K.C. could not walk properly, the ultimate factor here, however, is that, when determining whether an injury is serious bodily injury, the injury is to be evaluated before medical care is rendered. *See Stuhler v. State*, 218 S.W.3d 706, 714 (Tex. Crim. App. 2007); *Fancher v. State*, 659 S.W.2d 836, 838 (Tex. Crim. App. 1983); *Brown v. State*, 605 S.W.2d 572, 575 (Tex. Crim. App. [Panel Op.] 1980), *abrogated on other grounds by Hedicke v. State*,

779 S.W.2d 837 (Tex. Crim. App. 1989); *Sizemore v. State*, 387 S.W.3d 824, 828 (Tex. App.—Amarillo 2012, pet. ref'd).

The situation in *Brown* is instructive. *See Brown*, 605 S.W.2d at 575. There, the victim's nose had been broken and deformed by the break. Evidence was adduced that the nose would be disfigured and dysfunctional if the nasal bone had not been set properly. The Texas Court of Criminal Appeals ruled that the relevant issue was the disfiguring and impairing nature of the injury before treatment, not after the bone was set. *Id.* While surgery or particular medical care does not alone establish serious bodily injury, the details of the medical care may support a finding of serious bodily injury. *Fleming v. State*, 987 S.W.2d 912, 917–18 (Tex. App.—Beaumont 1999), *pet. dism'd*, 21 S.W.3d 275 (Tex. Crim. App. 2000) (metal plate attached to victim's pelvis with six screws supported inference that, at time of injury, both leg and pelvis were unable to support victim's weight). Likewise, the evidence of K.C.'s treatment supports the implied finding of serious bodily injury.

We overrule this appellate issue.

(3) Ineffective Assistance of Hendrix' Trial Counsel Was Not Established

Hendrix argues that his trial attorney was ineffective because he requested his trial attorney to do various things that he did not do: investigate adequately, request an examining trial, and challenge the indictment. Failure to follow a client's instructions as to strategic steps to take in a defense does not necessarily establish ineffective assistance.

The standard for ineffective assistance of counsel is clearly defined. *See Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a criminal

defendant must prove by a preponderance of the evidence (1) that his or her counsel's representation fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defense. *Id.* at 687; *Rosales v. State*, 4 S.W.3d 228, 231 (Tex. Crim. App. 1999); *Piland v. State*, 453 S.W.3d 473, 475 (Tex. App.—Texarkana 2014, pet. ref'd). Part of that proof must be that his or her attorney's failure to meet prevailing professional norms was, to a reasonable probability, the reason for a worse result from the trial. *Ex parte Martinez*, 195 S.W.3d 713, 730 (Tex. Crim. App. 2006); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000); *Piland*, 453 S.W.3d at 475.

Here, Hendrix has neither stated, nor made any showing concerning what any of the desired actions would have accomplished or that any of them would have made a difference in his conviction or sentence. Regarding Hendrix' claim that his counsel was deficient in not attacking the indictment for its lack of a seal, see the last point below. Ineffective assistance of counsel has not been shown.

We overrule this appellate issue.

(4) Indictments Need Not Bear a Seal

Hendrix also points to the indictment's lack of a seal and argues that the omission makes it fundamentally defective. We disagree.

A seal is not required on an indictment.[3] *See* TEX. CODE CRIM. PROC. ANN. art. 21.02 (West 2009).

[3]The requirements of an indictment are set out by statute:

> An indictment shall be deemed sufficient if it has the following requisites:
> 1. It shall commence, "In the name and by authority of The State of Texas".

We affirm the judgment of the trial court.[4]

Josh R. Morriss III
Chief Justice

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2. It must appear that the same was presented in the district court of the county where the grand jury is in session.
3. It must appear to be the act of a grand jury of the proper county.
4. It must contain the name of the accused, or state that his name is unknown and give a reasonably accurate description of him.
5. It must show that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented.
6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation.
7. The offense must be set forth in plain and intelligible words.
8. The indictment must conclude, "Against the peace and dignity of the State".
9. It shall be signed officially by the foreman of the grand jury.

TEX. CRIM. PROC. CODE ANN. art. 21.02 (West 2009).

[4]Since we agree that this case presents no reversible error, we also, in accordance with *Anders*, grant counsel's request to withdraw from further representation of Appellant in this case. *See Anders*, 386 U.S. at 744. No substitute counsel will be appointed. Should Appellant desire to seek further review of this case by the Texas Court of Criminal Appeals, Appellant must either retain an attorney to file a petition for discretionary review or file a pro se petition for discretionary review. Any petition for discretionary review (1) must be filed within thirty days from either the date of this opinion or the date on which the last timely motion for rehearing was overruled by this Court, *see* TEX. R. APP. P. 68.2, (2) must be filed with the clerk of the Texas Court of Criminal Appeals, *see* TEX. R. APP. P. 68.3, and (3) should comply with the requirements of Rule 68.4 of the Texas Rules of Appellate Procedure, *see* TEX. R. APP. P. 68.4.