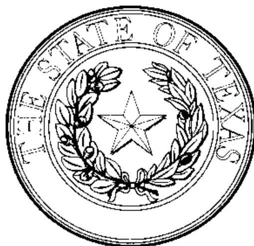
Opinion issued February 3, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00344-CR

BRANDON ROY VESTAL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 253rd District Court
Liberty County, Texas
Trial Court Case No. CR27552

MEMORANDUM OPINION

A jury convicted appellant Brandon Roy Vestal of injury to a child and assessed punishment at life imprisonment and a $10,000.00 fine.[1] In his first three

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[1] *See* TEX. PENAL CODE ANN. § 22.04 (Vernon Supp. 2010).

issues, appellant contends the trial court erred in dismissing a juror, not granting a mistrial in connection with the admission of evidence, and laying an evidentiary foundation for the admission of State's evidence. Appellant also contends his trial counsel was ineffective.[2] We affirm.

The underlying facts in the case are not in dispute on appeal. The Liberty County Sheriff's Department received a 9-1-1 call from appellant's house about a sick 15-month-old child, Brooke Erin Blackerby, who was having trouble breathing. Appellant was the only person at the house with the victim at the time she was injured. The victim was taken to the hospital, underwent emergency surgery for abdominal injuries, and eventually died. The medical examiner testified that the victim died as a result of blunt abdominal trauma.

In his first issue, appellant contends the trial court erred in dismissing a juror outside the presence of appellant. The juror called the trial court on the morning of the first day of trial and said that he had the flu. Outside the presence of appellant, the trial court asked counsel for appellant and State if there was any objection to the court finding that the juror was disabled and proceeding to trial with 11 jurors.

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[2] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Ninth District of Texas. Misc. Docket No. 09-9049 (Tex. Mar. 31, 2009); *see* TEX. GOV'T CODE ANN. § 73.001 (Vernon 2005) (authorizing transfer of cases). We are unaware of any conflict between precedent of the Court of Appeals for the Ninth District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

See TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (Vernon Supp. 2010) (disability of juror). Both counsel for appellant and State stated they had no objection.

A criminal defendant currently represented by counsel is not entitled to hybrid representation, and appellant has not cited any authority for the proposition that his counsel could not represent him in this regard. *Bledsoe v. State*, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005) (discussing hybrid representation). Furthermore, appellant has not demonstrated that he personally objected to the dismissal of the juror at any point in the trial, thus preserving this allegation of error. *See* TEX. R. APP. P. 33.1(a). Appellant also suggests that the juror was not disabled under Code of Criminal Procedure article 36.29(a) and that he was not personally present at the trial. *See* TEX. CODE CRIM. PROC. ANN. arts. 28.01, 33.03 (Vernon 2006) (presence of defendant). None of these arguments have been preserved for appeal. *See* TEX. R. APP. P. 33.1(a).

We overrule appellant's first issue.

In his second issue, appellant contends the trial court erred in failing to grant a mistrial regarding evidence that after surgery and prior to her death, the victim temporarily "actually had to have some of her intestines laying out of her stomach" because of swelling. Appellant initially objected based on a lack of evidence to support the testimony, which the trial court overruled. Appellant then asked for a mistrial because "[t]his prejudicial evidence has come in with no substantive basis

and no admission. There is no question that the child died, but whether the child had intestines laying out on the table does not have anything - - that has nothing to do with it."

Appellant did not object to the admission of the testimony based on Texas Rule of Evidence 403, arguing that even if it was relevant, the evidence should be excluded based on unfair prejudice. Appellant also did not ask for an instruction that the jury disregard the testimony. Instead, appellant suggests on appeal that "photographs of the [victim] were such that any probative value was greatly outweighed by the prejudicial effect of the evidence and testimony." The photographs, however, were admitted the next day of trial, and were not related to the trial court's ruling on the motion for mistrial.

The State responds that appellant has not preserved error because he should have objected on specific grounds and requested an instruction that the jury disregard the testimony before moving for a new trial. *See Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995). For both this reason and the fact that appellant argues on appeal about photographs that were not offered at the time of the objection, we overrule the second issue.

In issue three, appellant contends the trial court committed fundamental error by laying the foundation for the admission of two photographs of the victim. Appellant objected to the photographs as follows:

> Judge, we would object to these photographs here because it exposes the genital of the minor child, and there is no evidence in the record that the injuries which are shown or the treatment received by the child here - - in any way established the manner of cause of death, and they're not relevant for that purpose, and we object to the relevancy of these documents here for that purpose.

The trial court then proceeded to ask the following:

> Doctor, are these photographs - - photographs helpful to you and relevant in making a postmortem determination of the injuries and cause of death?

The doctor answered in the affirmative.

Appellant concedes that his trial counsel failed to object to the trial court's question, but argues that under both Texas Rule of Evidence 103(d) and case law he has not forfeited his right to challenge the propriety of the court's action. *See Marin v. State*, 851 S.W.2d 275, 278–81 (Tex. Crim. App. 1993) (discussing rights that can be forfeited, rights that can be expressly waived, and rights that cannot be waived), *overruled in part by Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). Appellant's issue on appeal relates not to the admission of the photographs, to which appellant objected, but to the trial court's asking of a predicate question, which appellant suggests indicates the judge's bias towards the State ("Clearly, the conduct of the trial court in questioning the witness in order to lay the proper predicate for the admission of photographs in favor of the State's case improperly influenced the jury in their consideration of the evidence in the case.").

While we agree that the trial court should have allowed the State to lay the predicate for its evidence, we do not agree that the trial court's conduct rises to the level of a fundamental error under Texas Rule of Evidence 103(d) or a right that cannot be forfeited under *Marin*. Appellant does not cite any authority that holds the trial court's action is not subject to the normal rules of waiver, and we know of no such authority. To the extent that the trial court did err, its action was not incurable if appellant had objected.

We overrule issue three.

In appellant's fourth issue, he claims his trial counsel was ineffective because trial counsel allegedly (1) did not file any discovery motions, (2) did not review evidence before trial, (3) did not consult with appellant about excusing the juror, (4) failed to object to a reference to appellant as a "child molesting bastard," (5) put incorrect information about appellant in a bond application that appellant was a lifetime resident of Liberty County, (6) "went into some detail" in questioning appellant at the bond hearing about underlying facts and circumstances, and (7) mispronounced the name of the deceased victim. To be entitled to a new trial based on ineffective assistance, a defendant must show that counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment, and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *See*

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986). The defendant bears the burden to prove ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Allegations of ineffective assistance of counsel must be firmly founded in the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The review of trial counsel's representation is highly deferential and presumes that counsel's actions fell within a wide range of reasonable professional assistance. *See Thompson v. State*, 9 S.W.3d 808, 812–13 (Tex. Crim. App. 1999) (citing *McFarland*, 928 S.W.2d at 500)). When the record is silent on the motivations underlying trial counsel's tactical decisions, appellant usually cannot overcome the strong presumption that trial counsel's conduct was reasonable. *See Thompson*, 9 S.W.3d at 813.

In the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *See Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). In this case, there was no evidentiary hearing on a motion for new trial. Because the reasonableness of trial counsel's choices often involves facts that do not appear in the appellate record, the Court of Criminal Appeals has stated that trial counsel should ordinarily be given an opportunity to explain his or her actions before a court reviews that record

and concludes trial counsel was ineffective. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). A petition for writ of habeas corpus usually is the appropriate vehicle to investigate ineffective-assistance claims. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). Without proof from the defendant that there is no plausible professional reason for trial counsel's act or omission, the reviewing court may not speculate on why counsel acted as he did. *See Bone*, 77 S.W.3d at 835–36.

On appeal, appellant points to a conversation at the bench that suggests that the district attorney did not give appellant counsel's full access to the State's files after counsel filed a discovery motion. The record is not clear whether counsel was denied access to the State's files in this case. Furthermore, the record does not explain who was responsible for the erroneous information in applicant's bond application, appellant or appellant's counsel. Finally, appellant does not explain how his counsel's questioning at the bond hearing or the mispronunciation of the deceased victim's name shows that his trial counsel failed the first prong of *Strickland*—counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment.[3]

[3] Appellant's allegations the trial counsel was ineffective for not consulting with appellant about excusing the juror and failing to object to a reference to appellant as a "child molesting bastard" were mentioned only in the appellate brief's summary of the argument and were not substantively

It is appellant's burden to prove that there was no plausible professional reason for his trial counsel's actions. While we acknowledge there would appear to be no sound trial strategy for mispronouncing the deceased victim's name, we are also not aware of any authority that such a mistake would cause counsel to per se fail the first prong of *Strickland*. Without speculating about any of the remaining allegations about trial counsel's lack of strategy, we hold that appellant has not met his burden under the first prong of *Strickland* to prove that his trial counsel was deficient. Because failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim, we do not reach appellant's arguments on the second prong of *Strickland*. *See Thompson*, 9 S.W.3d at 813.

We overrule appellant's fourth issue.

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briefed. Therefore, we need not address these allegations. *See* TEX. R. APP. P. 38.1(i).

We affirm the trial court's judgment.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).