In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-17-00121-CR

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DAVID BRADFORD BARNES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. 24752

MEMORANDUM OPINION

David Bradford Barnes was charged by indictment for the offense of continuous sexual abuse of a child, H.R.[1] A jury found Barnes guilty of the lesser offense of aggravated sexual assault, assessed punishment at ninety-nine years of confinement, and assessed a $10,000 fine. *See* Tex. Penal Code Ann. §

[1] We use initials to refer to the alleged victim and family members. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

22.021(a)(2)(B) (West Supp. 2017).[2] Barnes timely filed a notice of appeal. We affirm.

Barnes's indictment, as amended, alleged that:

> . . . on or about July 21, 2012 through March 31, 2016, [Barnes] did then and there during the period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age, including [an] act of sexual assault against [H.R.] . . on or about July 21, 2012, by inserting his male sexual organ into her female sexual organ, and on or about March 31, 2016, he did cause his male sexual organ to contact the female sexual organ of [H.R.] . . . and [Barnes] was at least seventeen years of age at the time of the commission of each of those acts.

Barnes's appointed counsel filed a brief that presents counsel's professional evaluation of the record and concludes the appeal is without merit and that there are no arguable grounds for reversal. *See Anders v. California*, 386 U.S. 738 (1967); *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978). We granted an extension of time for Barnes to file a *pro se* brief, and Barnes filed a *pro se* brief. In four appellate issues, Barnes argues that the trial court erred in admitting extraneous offense evidence, Barnes did not receive the effective assistance of counsel, there was prosecutorial misconduct, and the evidence was insufficient to support his conviction.

[2] We cite to the current version of the statute, as subsequent amendments do not affect the disposition of this appeal.

The Court of Criminal Appeals has explained the analytical procedure we should follow when appointed counsel files an *Anders* brief as follows:

> When faced with an *Anders* brief and if a later *pro se* brief is filed, the court of appeals has two choices. It may determine that the appeal is wholly frivolous and issue an opinion explaining that it has reviewed the record and finds no reversible error. [] Or, it may determine that arguable grounds for appeal exist and remand the cause to the trial court so that new counsel may be appointed to brief the issues.

Bledsoe v. State, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005) (citing *Anders*, 386 U.S. at 744; *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991)). Although an appellate court is not required to do so, "when a court of appeals finds no issues of arguable merit in an *Anders* brief, it may explain why the issues have no arguable merit." *Garner v. State*, 300 S.W.3d 763, 764 (Tex. Crim. App. 2009); *see Bledsoe*, 178 S.W.3d at 827.

Extraneous Offense Evidence

In his first issue, Barnes argues that "[e]vidence of more than one extraneous offense was admitted against Appellant in error and d[e]spite the fact that the prejudicial effects far outweighed any probative value[,]" and that the sentence assessed by the jury was "excessive and disproportionate punish[]ment[.]" During the pretrial hearing and at trial, Barnes's counsel requested a running objection on extraneous-offense evidence of conduct by Barnes against H.R., and argued the evidence was irrelevant. Barnes's counsel asked that the trial court give a limiting

instruction under rule 404(b) of the Texas Rules of Evidence at any time extraneous offense evidence was admitted. The trial court agreed to allow a running objection and agreed to give a limiting instruction in the charge. When the State first offered the extraneous offense evidence, Barnes's counsel objected "to the extraneous offenses as being irrelevant and they deny my client a right to a fair and impartial jury in due process of law." The State responded that such extraneous offenses are admissible under article 38.37 to show the relationship between the complainant and the defendant. The trial court overruled the objection, and Barnes's counsel then asked the trial court to read the previously requested instruction. The trial court instructed the jury as follows:

> So in this case evidence has been introduced that the defendant committed other crimes, wrongs, or acts against [H.R.] other than that for which he is on trial. You are instructed that you cannot consider such evidence for any purpose unless you first find from the evidence presented beyond a reasonable doubt that the defendant did commit those crimes, wrongs, or acts against [H.R.], if any.
>
> Therefore, if the State has not proven the defendant's guilt of those other crimes, wrongs, or acts against [H.R.], if any, beyond a reasonable doubt or if you have a reasonable doubt of the defendant's guilt of those other crimes, wrongs, or acts against [H.R.], if any, you should not consider such evidence for any purpose.
>
> Further, even if you find that the State has proven beyond a reasonable doubt the defendant's guilt of those other crimes, wrongs, or acts against [H.R.], if any, you may only consider such evidence for its bearing on the state of mind of the defendant and [H.R.] and on previous and subsequent relationships between the defendant and [H.R.] and you may not consider those other crimes, wrongs, or acts against [H.R.], if any, for any other purpose.

At trial, Barnes did not lodge a Rule 403 objection on the grounds that the evidence was more prejudicial than probative. Accordingly, this alleged error was not preserved. *See Clark v. State*, 365 S.W.3d 333, 339-40 (Tex. Crim. App. 2012) (an issue on appeal must comport with the objection made at trial, and an objection stating one legal basis may not be used to support a different legal theory on appeal); *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996) (appellant failed to preserve error on those issues where his trial objections did not comport with his arguments on appeal). Furthermore, even if Barnes had preserved error, his appellate brief does not include an analysis of the rule 403 balancing factors. *See* Tex. R. App. P. 38.1(i); *see also Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012) (discussing rule 403 balancing factors).

We further conclude that his argument that his punishment is excessive and disproportionate is also without merit. Barnes was convicted of aggravated sexual assault of a child, a first-degree felony, and the statutory punishment range authorized by the Legislature for such offense is imprisonment "for life or for any term of not more than 99 years or less than 5 years[,]" and "a fine not to exceed $10,000." *See* Tex. Penal Code Ann. § 12.32 (West 2011); § 22.021(e). Generally, a sentence that is within the range of punishment established by the Legislature will not be disturbed on appeal. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App.

1984). In addition, a punishment that is within the statutory range for the offense is generally not excessive or unconstitutionally cruel and unusual. *Kirk v. State*, 949 S.W.2d 769, 772 (Tex. App.—Dallas 1997, pet. ref'd). Furthermore, assuming without deciding that Barnes's sentence was disproportionate, the record contains no evidence reflecting what sentences are imposed for similar offenses in Texas or other jurisdictions by which to make a comparison. *Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.). Accordingly, we find no arguable merit to Barnes's first issue.

Ineffective Assistance of Counsel

In his second issue, Barnes contends his trial counsel rendered ineffective assistance by failing to conduct an independent investigation, failing to discover prior statements of State witnesses, failing to have an expert appointed, and failing to properly cross-examine the State's witness. According to Barnes, the cumulative effect of these alleged failures constituted ineffective assistance of counsel and denied Barnes a fair trial.

To establish that he received ineffective assistance of counsel, Barnes must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *See Strickland v. Washington*,

466 U.S. 668, 687-88, 694 (1984). The party alleging ineffective assistance has the burden to develop facts and details necessary to support the claim. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). A party asserting an ineffective-assistance claim must overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Strickland*, 466 U.S. at 689). An appellant's failure to make either of the required showings of deficient performance or sufficient prejudice defeats the claim of ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003); *see also Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

An ineffective assistance claim "must be 'firmly founded in the record' and 'the record must affirmatively demonstrate' the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). When the record is silent, an appellate court may not speculate about why counsel acted as he did. *Jackson*, 877 S.W.2d at 771; *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Without testimony from trial counsel, the court

must presume counsel had a plausible reason for his actions. *Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

Because no motion for new trial was filed in the present case, Barnes's counsel was not provided an opportunity to explain the choices he made in representing Barnes, and the record before us is silent about the strategy Barnes's attorney employed in presenting Barnes's case to the jury. Consequently, Barnes's complaint that he received ineffective assistance cannot be resolved on the record that is currently before us. *See Goodspeed*, 187 S.W.3d at 392. Therefore, we find no arguable merit to Barnes's second issue.

Prosecutorial Misconduct

In issue three, Barnes argues the "[p]rosecutor intentionally and knowingly su[]pressed [medical evidence] that w[as] favorable to the defense[,]" and that "the State presented and failed to correct perjured testimony." Appellant provided no citations to the record in support of either argument, and his argument is insufficiently briefed and unpersuasive. *See* Tex. R. App. P. 38.1(i). Accordingly, we find no arguable merit to Barnes's third issue.

Sufficiency of the Evidence

In his fourth issue, Barnes challenges the sufficiency of the evidence supporting his conviction because there was no expert testimony or physical

evidence of penetration. "The lack of physical or forensic evidence is a factor for the jury to consider in weighing the evidence." *Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). There is no requirement that physical, medical, or other evidence be proffered to corroborate the victim's testimony regarding the sexual offense in this case. *See* Tex. Code Crim. Proc. Ann. art. 38.07 (West Supp. 2017) (if at the time of the sexual offense is alleged to have occurred the victim was seventeen years of age or younger, then a conviction is "supportable on the uncorroborated testimony of the victim"); *Sandoval v. State*, 52 S.W.3d 851, 854-55 & n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (medical evidence and corroborating testimony were not necessary to support conviction for aggravated sexual assault of a child). Here, the jury heard from the victim H.R., who was younger than seventeen, testify about the sexual contact with the defendant. The jury also heard the Sexual Assault Nurse Examiner testify that she conducted the exam on H.R. and that, given the nature of the allegations in this case, it is not unusual that there would be an absence of physical injuries. After a thorough review of the record and giving proper deference to the jury's verdict, we conclude the jury was rationally justified in finding Barnes guilty beyond a reasonable doubt of aggravated sexual assault of a child. We conclude Barnes's fourth issue has no arguable merit.

Conclusion

Upon receiving an *Anders* brief, this Court must conduct a full examination of all the proceedings to determine whether the appeal is wholly frivolous. *Penson v. Ohio*, 488 U.S. 75, 80 (1988) (citing *Anders*, 386 U.S. at 744). We have reviewed the entire record, counsel's brief, and Appellant's *pro se* brief, and we have found nothing that would arguably support an appeal. *See Bledsoe*, 178 S.W.3d at 827-28 ("Due to the nature of *Anders* briefs, by indicating in the opinion that it considered the issues raised in the briefs and reviewed the record for reversible error but found none, the court of appeals met the requirements of Texas Rule of Appellate Procedure 47.1."). Therefore, we find it unnecessary to order appointment of new counsel to re-brief the appeal. *Compare Stafford*, 813 S.W.2d at 511. We affirm the trial court's judgment.[3]

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on April 18, 2018
Opinion Delivered May 2, 2018
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Before Kreger, Horton, and Johnson, JJ.

[3] Barnes may challenge our decision in this case by filing a petition for discretionary review. *See* Tex. R. App. P. 68.