

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00083-CR

David Lynn Johnson, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF SAN SABA COUNTY, 33RD JUDICIAL DISTRICT
NO. 5848, HONORABLE EVAN C. STUBBS, JUDGE PRESIDING**

MEMORANDUM OPINION

David Lynn Johnson appeals his judgments of conviction for aggravated sexual assault of a child and tampering with a witness. *See* Tex. Penal Code §§ 22.021, 36.05. After a bench trial, the district court found Johnson guilty and assessed punishment at forty years' imprisonment for the aggravated sexual assault and twenty-five years' imprisonment for the witness tampering, with the sentences running concurrently. The court certified Johnson's right of appeal.

Johnson's court-appointed attorney has filed a motion to withdraw supported by a brief addressing this appeal and concluding that this appeal is frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738, 744 (1967), by presenting a professional evaluation of the record in this cause demonstrating why there are no arguable appellate grounds to be advanced. *See id.*; *see also Penson v. Ohio*, 488 U.S. 75, 80 (1988); *High v. State*, 573 S.W.2d 807, 811-13 (Tex. Crim. App. 1978); *Currie v. State*, 516 S.W.2d 684, 684 (Tex. Crim.

App. 1974); *Jackson v. State*, 485 S.W.2d 553, 553 (Tex. Crim. App. 1972); *Gainous v. State*, 436 S.W.2d 137, 138 (Tex. Crim. App. 1969). Counsel sent a copy of the brief to Johnson, advised him of his right to examine the appellate record in this cause and to file a pro se brief, and supplied Johnson with a form motion for pro se access to the appellate record. *See Anders*, 386 U.S. at 744; *Kelly v. State*, 436 S.W.3d 313, 319-20 (Tex. Crim. App. 2014). Johnson then filed a pro se brief complaining that he received ineffective assistance of counsel, that a report from his testifying expert was not admitted into evidence, and that the State's witnesses were not credible.

Testimony from Johnson's bench trial

The district court conducted a bench trial and heard testimony from several witnesses including Johnson's victim M.B.F.; her mother B.F., with whom Johnson had a live-in romantic relationship; and three individuals who testified that Johnson admitted sexually abusing M.B.F.

B.F. testified that Johnson told her that he had performed oral sex on M.B.F. and that he claimed he was "teaching" her things she needed to know. B.F. also testified that Johnson told M.B.F. to say that her allegations against him were lies.

M.B.F. testified that Johnson performed oral sex on her, penetrated her with his fingers, and made her touch his genitals. She stated that Johnson began sexually abusing her when she was eleven years old, and that he did so multiple times over the next several months. M.B.F. also testified that Johnson told her not to tell anybody about what he had done because it would get him sent to prison. After she reported the abuse, M.B.F. testified that Johnson offered her marijuana, unlimited cell-phone minutes, and \$100 per week if she recanted her allegations against him.

Nathan Blackshear testified that he was a friend of Johnson's who also worked some construction jobs with him. Blackshear testified that on multiple occasions, Johnson admitted to performing oral sex on M.B.F. Blackshear also testified that he had seen Johnson giving M.B.F. cigarettes, money, alcohol, and marijuana. According to Blackshear, Johnson approached him about "how to beat the case" and discussed having M.B.F. change her story. Blackshear also recalled hearing Johnson threaten his own daughter T.J.P. by stating that if she testified against him, he would call CPS and make sure that she lost all of her children. Blackshear's wife Yvonne Blackshear also testified, corroborating her husband's testimony as to Johnson's admission about performing oral sex on M.B.F.

Victor Hill, who had known Johnson for six years, testified that Johnson twice admitted that he had performed oral sex on M.B.F. and that he would go to prison for it. Hill also testified that Johnson said he was obligated to teach M.B.F. about sex.

Reta Peel, Johnson's mother's companion, testified that Johnson admitted to her that he had sexually abused M.B.F.

Issues in Johnson's pro se brief are frivolous

Johnson contends that his trial counsel provided ineffective assistance by advising him to waive a jury, by asking Johnson to write down questions for cross-examination that were apparently not raised with witnesses, and by advising Johnson against testifying. However, to prevail on an ineffective-assistance claim, a defendant must show that his counsel's representation was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Claims of ineffective assistance of counsel must be supported by the

record, and where the record is silent regarding counsel's strategy or tactics, we will not speculate as to the basis for counsel's decision. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)). Here, we conclude that Johnson's claim of ineffective assistance of counsel lacks merit because the record is silent as to his counsel's strategy or tactics and thus, Johnson has not met his burden of showing deficient performance and prejudice. *See Strickland*, 466 U.S. at 687.

In his next issue, Johnson complains that a report from his testifying expert was not admitted into evidence. However, Johnson presents no argument or authorities explaining why the report should have been admitted. This issue is inadequately briefed and presents nothing for our review. *See Tex. R. App. P. 38.1*. Further, we note that Johnson's expert was allowed to testify about her opinions during the bench trial.

In his last issue, Johnson complains about the credibility of the State's witnesses. He alleges that the woman who filed the charges against him did so to prevent him from getting custody of their son and alleges that she was removed from the courtroom for being high on methamphetamine. Johnson further alleges that "[k]ey witnesses for the State were her friends, who, on the witness stand, admitted to doing drugs and whose testimonies could easily be bought with drugs" and that "[o]ther witnesses included her family members." However in a bench trial, the trial court is the factfinder and the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995). We give almost complete deference to a factfinder's decision when it is based on an evaluation of credibility.

Lancon v. State, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). Further, the district court heard evidence about certain witnesses' history of drug abuse and about the witnesses' relationships to the parties but apparently was not persuaded to completely disregard their testimony. Thus, this issue lacks merit.

None of the issues in Johnson's pro se brief present a nonfrivolous ground for reversing his convictions on appeal. Having thoroughly reviewed the record and the briefs filed in this cause, we agree with counsel's assessment that this appeal is frivolous and without merit. *See Garner v. State*, 300 S.W.3d 763, 766 (Tex. Crim. App. 2009); *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005). Counsel's motion to withdraw is granted. The judgments of conviction are affirmed.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: September 22, 2017

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