NO. 12-11-00048-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

DICKIE PAUL BELLANGER, APPELLANT	***§***	***APPEAL FROM THE 2ND***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***CHEROKEE COUNTY, TEXAS***

MEMORANDUM OPINION
PER CURIAM

Dickie Paul Bellanger appeals his convictions for two counts of aggravated sexual assault of a child and two counts of injury to a child. Appellant's counsel filed a brief asserting compliance with ***Anders v. California***, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and ***Gainous v. State***, 436 S.W.2d 137 (Tex. Crim. App. 1969). Thereafter, Appellant filed a pro se brief. We affirm.

BACKGROUND

A Cherokee County grand jury returned a five count indictment against Appellant, alleging two counts of aggravated sexual assault of a child, two counts of injury to a child, and one count of indecency with a child.[1] Over the course of a three day jury trial, the State presented evidence through six witnesses detailing the events surrounding the victims' sexual assaults and injuries. Upon the State's close, Appellant presented his case and called seven witnesses, including family members and one expert. During the charge conference, the State abandoned its fifth count of indecency with a child.

[1] *See* TEX. PENAL CODE ANN. § 22.021 (West 2011) (aggravated sexual assault); ***id***. § 22.04 (injury to a child); ***id***. § 21.11 (indecency with a child).

The jury found Appellant guilty on all counts of aggravated sexual assault of a child and injury to a child. The trial court assessed a seventy-five year consecutive sentence on each count of aggravated sexual assault of a child and a ten year concurrent sentence on each count of injury to a child. This appeal followed.

ANALYSIS PURSUANT TO *ANDERS V. CALIFORNIA*

Appellant's counsel has filed a brief in compliance with ***Anders*** and ***Gainous***. Counsel states that he has diligently reviewed the appellate record and that he is well acquainted with the facts of this case. In compliance with ***Anders***, ***Gainous***, and ***High v. State***, 573 S.W.2d 807 (Tex. Crim. App. 1978), counsel's brief presents a thorough chronological summary of the procedural history of the case and further states that counsel is unable to present any arguable issues for appeal. *See* ***Anders***, 386 U.S. at 745, 87 S. Ct. at 1400; *see also* ***Penson v. Ohio***, 488 U.S. 75, 80, 109 S. Ct. 346, 350, 102 L. Ed. 2d 300 (1988).

Appellant filed a pro se brief in which he raised issues concerning the sufficiency of the evidence and the excited utterance exception to the hearsay rule. We considered counsel's brief and Appellant's pro se brief, and have also conducted our own independent review of the record. We found no reversible error. *See* ***Bledsoe v. State***, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005). However, we provide additional detail as to why the trial court's admission of the hearsay evidence addressed in both counsel's brief and Appellant's pro se brief is not an arguably meritorious issue for appeal. *See* ***Garner v. State***, 300 S.W.3d 763, 767 (Tex. Crim. App. 2009) (holding that court of appeals finding no arguable issues in ***Anders*** brief may explain why issues have no arguable merit).

Admissibility of Hearsay Statement

We review a trial court's ruling on the admissibility of a hearsay statement for an abuse of discretion. ***Zuliani v. State***, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). We reverse only when "the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." ***Id.***

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. ***Apolinar v. State***, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005). The rationale for this exception is based on the assumption that at the time the declarant makes the statement, she is not capable of the kind of

reflection to enable her to fabricate information. ***Id***.

For a statement to qualify as an excited utterance, the following criteria must be met: (1) the statement must be the product of a startling event, sufficient to evoke a truly spontaneous reaction from the declarant, (2) the declarant must be dominated by the emotion, excitement, fear, or pain of the event at the time the statement is made, and (3) the statement must relate to the startling event. ***McCarty v. State***, 257 S.W.3d 238, 241 (Tex. Crim. App. 2008); ***Ross v. State***, 154 S.W.3d 804, 808 (Tex. App.—Houston [14th Dist] 2004, pet. ref'd). The court may also consider the length of time between the occurrence and the statement, the nature of the declarant, whether the statement is made in response to a question, and whether the statement is self-serving. ***Apolinar***, 155 S.W.3d at 187.

In the present case, the child victims' grandmother testified that during the first two weeks following the children's assault, both children slept with their grandparents. Approximately two days after the assault, the grandmother was awakened by her two year old granddaughter having a nightmare, "throwing" her arms, and saying, "Stop. Stop. Stop. Stop." The grandmother testified that when the child awoke, she was crying, wild-eyed, and disoriented, asking, "Nana, where's Dickie?" The grandmother told the child that "Dickie is not here, you're okay, you're right here." The child then said, "Nana, Dickie hurt me."

The startling event here was the child's nightmare. The child's behavior before she awoke—"throwing" her arms and repeatedly saying "stop"—indicates that the nightmare was sufficient to evoke a truly spontaneous reaction from the child. When the child awoke, she was crying, wild-eyed, disoriented, and thus clearly dominated by the emotion, excitement, or fear that she experienced as a result of the nightmare. At the time of the nightmare, the child was still recovering from injuries she suffered during the sexual assault that occurred two days earlier. Therefore, the trial court reasonably could have found that the statements, "Nana, where's Dickie" and "Dickie hurt me," related to the nightmare as well as to the earlier sexual assault.[2]

The child made the statements only a few seconds after she awoke from the nightmare. She was two years old at the time. Her statements were not in response to a question, nor were they self-serving. Moreover, the child was not of sufficient age to consider whether her statements would later be used against Appellant. *See* ***Wilson v. State***, 195 S.W.3d 193, 203

[2] *See* ***McCarty v. State***, 257 S.W.3d 238, 240 (Tex. Crim. App. 2008) (holding that startling event may trigger spontaneous statement related to much earlier incident; declarant's statement about defendant's tickling (earlier incident) was excited utterance because it related to uncle's tickling (startling event)).

(Tex. App.—San Antonio 2006, no pet.) ("illogical to conclude that a four year old child would have considered whether the statements would be used").

Under these circumstances, the child's statements qualify as an excited utterance. Therefore, we agree with Appellant's counsel that an issue challenging the admissibility of these statements would not arguably support an appeal.

CONCLUSION

As required, Appellant's counsel has moved for leave to withdraw. *See* ***In re Schulman***, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) (orig. proceeding); ***Stafford v. State***, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). We are in agreement with Appellant's counsel that the appeal is wholly frivolous. Accordingly, his motion for leave to withdraw is hereby ***granted***, and we ***affirm*** the trial court's judgment. TEX. R. APP. P. 43.2.

Counsel has a duty to, within five days of the date of this opinion, send a copy of the opinion and judgment to Appellant and advise him of his right to file a petition for discretionary review. *See* TEX. R. APP. P. 48.4; ***In re Schulman***, 252 S.W.3d at 411 n.35. Should Appellant wish to seek further review of this case by the Texas Court of Criminal Appeals, he must either retain an attorney to file a petition for discretionary review or he must file a pro se petition for discretionary review. *See* ***In re Schulman***, 252 S.W.3d at 408 n.22. Any petition for discretionary review must be filed within thirty days after the date of this opinion or after the date this court overrules the last timely motion for rehearing. *See* TEX. R. APP. P. 68.2(a). Any petition for discretionary review must be filed with the clerk of the Texas Court of Criminal Appeals. *See* TEX. R. APP. P. 68.3(a). Any petition for discretionary review should comply with the requirements of Rule 68.4 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 68.4; ***In re Schulman***, 252 S.W.3d at 408 n.22.

Opinion delivered April 18, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)