

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1995 SESSION

FILED

July 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. #03C01-9502-CR-00030
APPELLEE,	*	SULLIVAN COUNTY
VS.	*	Hon. W. Fred Axley (By Designation)
MICHAEL RICHARD TRINKLE,	*	(Post-Conviction)
APPELLANT.	*	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Michael Richard Trinkle, appeals as of right from the Sullivan County Criminal Court's judgment denying his petition for post-conviction relief. On appeal, the appellant contends that his trial counsel was ineffective for (a) failing to object to hearsay testimony, (b) failing to object to leading questions, (c) failing to subpoena and present key defense witnesses, (d) failing to object to the amended indictment, (e) failing to obtain a transcript of the preliminary hearing, (f) failing to raise the statute of limitations defense, and (g) failing to move for judgments of acquittal at the conclusion of the trial. The appellant also lists as an issue, but does not argue, the propriety of the trial court's findings of fact and conclusions of law. We find no error and affirm the judgment of the trial court.

In June of 1987, the appellant was charged with eight counts of aggravated rape and one count of aggravated sexual battery. The offenses were allegedly committed against the appellant's step daughter, G.S., a female who was less than thirteen years of age. A trial was held in September of 1987. This court summarized the evidence on direct appeal:

Appellant's defense, and his testimony, was that he did not commit the acts charged. His trial strategy was to discredit the testimony of the victim and suggest that the accusation emanated from an acrimonious divorce between Appellant and the victim's mother. . . .

The victim, who was 14 years of age at the time of trial, gave a detailed narrative account of each offense. She testified that she was sexually abused over a period of several years beginning soon after the death of her father and ending prior to her mother's divorce from the appellant. She testified that she submitted to the acts because she was afraid of the appellant. She described violent attacks upon her, her brother, and her mother, including an incident when he hit her brother in the face, broke her mother's wrist, and knocked the victim down. She related each offense to the place where the family, which moved frequently, was living at the time, where she was attending school, her grade in school and significant events such as her birthday. Her testimony with regard to the month and year of each offense was consistent with the dates charged in the presentment.

State v. Michael Trinkle, No. 824 (Tenn. Crim. App., Knoxville, July 13, 1989), perm. to appeal denied, (Tenn., Oct. 2, 1989). The appellant was convicted of seven counts of aggravated rape and two counts of aggravated sexual battery. He was sentenced to forty years for each aggravated rape and to twenty years for each aggravated sexual battery; the sentences were to run concurrently.

The appellant retained present counsel to represent him at the hearing on the motion for a new trial and on appeal. At the hearing on the motion for a new trial, the trial court dismissed both convictions for aggravated sexual battery because the statute of limitations had expired. The trial court also granted judgments of acquittal for two of the aggravated rape convictions because there was insufficient evidence to prove the offenses. The remaining judgments were affirmed on direct appeal, and the Tennessee Supreme Court denied permission to appeal. Id. This post-conviction suit, alleging ineffective assistance of trial counsel, was litigated in two evidentiary hearings before then Sullivan County Criminal Court Judge George H. Garrett. Following the hearings, and Judge Garrett's death, Judge W. Fred Axley was designated to complete the proceedings. On July 29, 1994, Judge Axley entered written findings and conclusions, denying the petition for post-conviction relief. This appeal followed.

In post-conviction cases, the burden is on the petitioner to prove allegations by a preponderance of the evidence. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); Vermilye v. State, 754 S.W.2d 82, 84 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1987). On appeal, we are bound by the trial court's findings of fact unless the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990). The appellant has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

I

To establish a claim of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution, a petitioner must show (a) that counsel's performance was deficient and (b) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687 (1984). Appellate review of such an issue does not have to begin with the attorney's conduct; if prejudice is not shown, we need not determine the validity of the allegations regarding deficient performance. Id. at 697. The Strickland standard has been applied as well to the right to counsel under Article 1, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874 (1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether services rendered were within the range of competence demanded of attorneys in criminal cases. In reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Id.

A

The appellant argues that counsel was ineffective for failing to object to hearsay statements elicited from the victim's school teacher. The trial transcript reveals that Sharon Hill Tabor was the victim's third and fourth grade teacher. In the spring of 1984, the victim told Tabor that she had been "abused" by the appellant. Tabor testified that she "most definitely" believed the victim. No objection was made at trial.

The appellant now argues that the statement was inadmissible because it had been made over a year after the most recent offense charged in the presentment.¹ The State contends that the statement satisfied the “fresh complaint” doctrine, which was then applicable to child sexual abuse cases. During the post-conviction hearings, counsel gave two, somewhat conflicting explanations for failing to object. First, he believed that the statement satisfied the “fresh complaint” doctrine. Second, he believed that even if the victim’s statements were inadmissible, the teacher’s failure to report the allegations reflected adversely on the credibility of the victim. The appellant testified that counsel never discussed either of these rationales with him.

At the time of this trial, the fresh complaint doctrine in Tennessee allowed a victim’s complaint of rape or sexual assault, including the details, made to another person soon after the event to be admitted in the State’s case in chief. Phillips v. State, 28 Tenn. 246, 247 (1848).² The purpose was to corroborate the victim’s in court testimony about the offense in anticipation of an impeaching attack against the truth or accuracy of the victim’s testimony. King v. State, 210 Tenn. 150, 357 S.W.2d 42, 45-46 (1962); State v. Dies, 829 S.W.2d 706, 709 (Tenn. Crim. App. 1991). The question of whether a victim’s statement qualified as fresh complaint depended on the surrounding facts and circumstances. Id. at 709; State v. Lewis, 803 S.W.2d 260, 264 (Tenn. Crim. App. 1990). Relevant factors included the amount of time between the event and the statement, the spontaneity of the statement, the age and maturity of the victim, the use of threats or means of intimidation by the offender, the victim’s opportunity and capacity to explain, and the relationship between the victim and the offender. Id. at 264; see also State v. Kendricks, 891 S.W.2d 597, 606 (Tenn. 1994)(Reid J., concurring). In child sexual abuse cases, a specific fear

¹ The statement was made in the spring of 1984. The immediately preceding offense charged in the presentment occurred in December of 1982.

² The doctrine was recently abolished as applied in child sexual abuse cases. State v. Livingston, 907 S.W.2d 392 (Tenn. 1995).

of the offender often justified a delay in the victim's statement. Hill v. State, 73 Tenn. 725, 732 (1880); Curtis v. State, 167 Tenn. 430, 70 S.W.2d 364, 366 (1934).

Thus, upon a timely objection at trial, the trial court would have had to determine the admissibility of the victim's statement to Tabor based on all of the above factors. At this stage of the proceedings, however, we need not do so, nor do we need to address counsel's alleged deficiency for failing to object. On direct appeal, our court held that the teacher's testimony did not amount to reversible error. State v. Michael Trinkle, supra, slip op. at 2-3. We believe that this conclusion applies as well to the prejudice prong of Strickland v. Washington, supra. The victim gave a detailed, narrative account of the sexual abuse. The admission of her brief statement to Tabor did not result in a reasonable probability of a different outcome nor did it render the proceedings fundamentally unfair. Id.

The appellant also contends that counsel was ineffective for failing to object to the testimony of the examining physician. Dr. E.C. Goulding testified that he examined the victim in November of 1985, which was more than one year after the last offense charged in the indictment. He related statements made by the victim:

[S]he reported sexual abuse from 1980 until the summer of 1984, including 'Patient states that she had had sodomy, and had been forced to have oral intercourse with this man...', and also it says, 'attempted vaginal intercourse,' and the patient reported that he had 'never put it all the way in' at that time. She also has stated some history of being forced to have sex with her smaller brother. She was unsure the date that that happened because it was two (2) or three (3) years before the exam, and there had been some reports, patient [had] possibly been beaten with a belt.

On cross examination, the appellant's trial counsel elicited the following history told to the physician by the victim's younger brother:

[H]e stated that [the appellant] beat him at times with a belt, and with his fists, and forced him to have sexual encounters with his older sister. He denied any sexual abuse or advances by [the appellant] at that time, or any previous time.

[T]he patient reports that the [appellant] forced them to have both oral, vaginal, and anal sex with his sister at that time. He denied having any anal pain at that time.

The appellant asserts that his trial counsel should have objected to this material because it was not “reasonably pertinent to medical diagnosis and treatment.” See Tenn. R. Evid. 803(4). In the initial evidentiary hearing, counsel testified that he thought the doctor’s findings were “favorable” to the appellant, and that he believed the victim’s history was admissible. In the second hearing, counsel testified that he believed the victim’s statements were not for treatment and diagnosis; however, he did not object to the statements because he believed they were inconsistent with the victim’s trial testimony and the doctor’s findings. Similarly, because certain charges involved the victim’s brother, counsel elicited the victim’s brother’s statements to show inconsistencies with the victim’s testimony. Counsel noted that the victim’s brother’s statements mentioned anal penetration whereas the victim’s testimony did not. Moreover, the doctor’s findings did not reflect any information with regard to potential harm caused by anal penetration. Counsel reiterated that his strategy was to show as many inconsistencies as possible. The appellant testified that counsel never discussed these tactics with him.

As the appellant notes, for the statements to have been admissible, they must have been “reasonably pertinent to medical diagnosis and treatment.” See Tenn. R. Evid. 803(4). Although there is a question as to whether such a foundation was present, we conclude that the appellant is not entitled to relief on this ground. Counsel’s decision to use the statements as examples of the victim’s inconsistencies was, arguably, a tactical one. Hellard v. State, supra. Moreover, as noted by the State, our court said on direct appeal that the physician’s testimony did not amount to reversible error. In sum, even if the evidence had been objectionable, the appellant has not met the prejudice prong of Strickland v. Washington, supra.

B

The appellant also claims that his trial counsel was ineffective for failing to object to leading questions asked by the State in its direct examination of the victim. The appellant argues that the State used the leading questions to provide specific dates of the offenses because the victim was unable to do so on her own. During the evidentiary hearing, counsel testified that he was aware the questions were leading; however, he believed that the jury would notice that the State, and not the victim, was supplying the dates. Counsel testified:

[It was] very consistent with the whole scenario that the indictment was general in that way. The testimony was general, and had to be given, dates had to necessarily be elicited from them in this way. I thought it was very consistent, and was obvious to the jury that these children did not know the specific dates.

Counsel also testified that he was concerned that objections to the prosecutor's questions may have allowed the victim to testify about uncharged conduct, as she had previously made allegations that the abuse had been "continual." The appellant testified that counsel never discussed with him the reasons for failing to object to the State's questions.

As noted by our court on direct appeal, the transcript reveals that the victim gave a "detailed narrative description" and "related each offense to the place where the family, which moved frequently, was living at the time, where she was attending school, her grade in school and significant events such as her birthday." The prosecutor followed up on several of the victim's responses with questions that directed the victim to a specific month and year. For example, the following colloquy occurred after the victim described in detail the offenses that occurred in August of 1981:

Q-- Now, these things you described, that was in August of 1981?

A-- Yes.

Q-- When you lived in the Arnold house?

A-- Yes.

Q-- If we could now go to December of '82, the Emmet Road-- where did you live in December of 1982?

A-- On Emmet road.

After the victim detailed the incidents that occurred on Emmet Road, the prosecutor asked: "This was December of 1982?" Thereafter, the prosecutor asked, "Now, if we could go to July of '84, I think in the Sinking Springs area. Where did you live in July of '84?" The victim then related where she lived at that time and described the offenses that occurred at that residence.

Although an objection to the leading nature of such questions may have been well founded,³ we note that the victim's testimony was much like that described by our supreme court in State v. Byrd, 820 S.W.2d 739 (Tenn. 1991). In Byrd, the court noted that in child sexual abuse cases, the State may have to rely on descriptive information such as references to "birthdays, seasonal celebrations and holidays, the beginning or end of the school year, or visitations by relatives." Id. At 740-741. In this regard, the victim's detailed testimony related the offenses to the time frames charged in the presentment. As our court noted on direct appeal, the record did not reveal reversible error in the victim's testimony. Accordingly, we conclude that the appellant has not shown that counsel's failure to object resulted in a reasonable probability of a different outcome.

C

The appellant argues that counsel was ineffective for failing to call two defense witnesses who could have testified that the appellant and the victim had a good relationship and that the victim's mother had a motive to fabricate charges against the appellant. At the evidentiary hearing, counsel testified that he thought the witnesses were "critical," but that he had difficulty locating them and gaining their cooperation. Counsel recalled "scrambling at the last minute" to issue subpoenas at an address he had learned immediately before the trial was to begin. Counsel also sought a continuance on the

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In fact, the record reveals that counsel's two objections to leading were sustained by the trial judge.

morning of the trial in an effort to secure the witnesses. The motion was denied. The appellant testified that he had expected the witnesses to testify and that he thought the trial would be continued so the witnesses could be located.

In Black v. State, 794 S.W.2d at 755, our court noted that “when a petitioner contends that trial counsel failed to discover, interview or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” There is no other way for this court to determine the materiality of the witness’s testimony and to consider what, if any, prejudice ensued to the petitioner. Id.

As the appellant concedes on appeal, the witnesses did not testify during the post-conviction hearings. Instead, the appellant purports to rely on the affidavit filed by trial counsel when the continuance was requested before trial. The affidavit asserted that the witnesses were “crucial” to the preparation of the defense. The affidavit did not, however, set forth the specific testimony that the witnesses would have presented. Thus, we cannot determine whether the appellant was prejudiced by counsel’s inability to secure the attendance of these witnesses. Moreover, we note that trial counsel presented five witnesses at trial who testified that the appellant and the victim appeared to have a good relationship and that the victim never reported or showed signs of abuse. Accordingly, we conclude that the appellant has failed to show that he was prejudiced in this regard.

D

According to the appellant, the “original 1986 indictment” alleged that the offenses charged in case numbers 20,521, 21,131, 21,132, and 21,133, were committed in 1980, and that the offense charged in case number 21,135 was committed in 1983. In May of 1987, the State moved to amend the 1980 offenses to 1981, and to amend the 1983 offense to 1984. The appellant argues that counsel was ineffective for failing to oppose the amendments to the indictment and for failing to seek the dismissal of the

indictment for its lack of specific dates. We initially note that a presentment returned by the grand jury in June of 1987 contained the following charges and alleged dates:

#20,521	Aggravated Rape	July, 1981
#21,131	Aggravated Rape	August 1981
#21,132	Aggravated Rape	August 1981
#21,133	Agg. Sexual Battery	August 1981
#21,134	Aggravated Rape	December 1982
#21,135	Aggravated Rape	July 1984
#21,136	Aggravated Rape	August 1984
#21,137	Aggravated Rape	August 1984
#21,138	Aggravated Rape	August 1984

Counsel testified that he discussed the charges at length with the prosecuting attorney and the investigative detective, Terry Hazard. In May of 1987, the State moved to amend the indictment. Counsel testified that he knew the State could go back to the grand jury if it chose to do so; thus, in return for a continuance, he did not oppose amending the charging instrument. According to counsel, the appellant had retained a private investigator around the same time, and the continuance assisted the defense by providing additional time in which to locate and interview prospective defense witnesses. Moreover, counsel testified that the additional time allowed him to prepare the defenses for the new alleged dates.

Detective Terry Hazard testified that he began investigating the allegations of sexual abuse in May of 1985. An affidavit of complaint was sworn in June of 1986. Hazard conceded that the affidavit alleged incidents occurring from 1977 to 1984, a time span that differed from that in the indictment or presentment. Hazard noted that there had been a typographical error in the affidavit and that the victim related many more incidents than those charged. As the investigation progressed, the victim was able to relate the specific offenses to places she had lived and her grade in school. Hazard testified that the victim's allegations never wavered and that the victim was never "coached" to relate the offenses to certain events.

It is well established that the exact date of the offense need not be stated in an indictment or presentment unless the date or time “is a material ingredient in the offense.” Tenn. Code Ann. § 40-13-207. A charging instrument need only state that the offense was committed before the return of the indictment or the presentment. Id. Moreover, to satisfy constitutional safeguards, the charging instrument must provide the accused with notice of the charged offense, provide the accused with protection against double jeopardy, and provide the court with an adequate ground upon which to enter a judgment. State v. Haynes, 720 S.W.2d 76, 82 (Tenn. Crim. App. 1986).

Here, the appellant has not shown that he was harmed by counsel’s failure to oppose the amendments to the indictment. Counsel testified that he had discussed the charges at length with the prosecuting attorney and investigating officer. Counsel also noted that he obtained a continuance so as to prepare the defense for the State’s proposed amendments. In any event, it appears that the original indictment was essentially superseded by the grand jury’s presentment of the charges. Additionally, as noted above, the presentment was legally sufficient notwithstanding the lack of specific dates. Thus, counsel was not deficient for failing to seek its dismissal on that ground.

E

The appellant claims that counsel was ineffective for failing to obtain a transcript of the preliminary hearing and failing to cross examine the victim with her statement that the appellant did not penetrate her. Counsel testified that he did not represent the appellant at the preliminary hearing and that he could not recall why he did not obtain a transcript of the hearing. He admitted that his strategy was to show as many inconsistencies as possible in the victim’s allegations.

Counsel in a criminal case has an obligation to investigate all factual and legal defenses. Baxter v. Rose, 523 S.W.2d at 933. The duty includes interviewing

witnesses and securing discoverable information from the prosecution and law enforcement agencies. Id. Although counsel conceded that he did not secure a transcript of the preliminary hearing as part of his preparation for trial, the appellant has failed to show that he was prejudiced. The appellant's only claim-- that the victim testified during the preliminary hearing that she was never penetrated by the appellant-- is taken out of context. A review of the preliminary hearing transcript reveals that the victim testified that the appellant tried to penetrate her vagina with his penis in August of 1984, but was unsuccessful. She gave the same testimony about this offense at trial. Moreover, her preliminary hearing testimony, and her trial testimony, was replete with instances of digital and oral penetration to support the remaining charges. In sum, the appellant has not shown that trial counsel's failure to use a transcript of the preliminary hearing resulted in a reasonable probability of a different outcome.

F & G

Finally, the appellant claims that counsel was ineffective for failing to raise the statute of limitations defense to the charge for aggravated sexual battery, and for failing to move for a judgment of acquittal on the convictions following the trial. He acknowledges that convictions were dismissed on these grounds post-trial, but insists that counsel's failures were indicative of his overall ineffectiveness.

The presentment contained one charge of aggravated sexual battery, which was alleged to have been committed in August of 1981. The affidavit of complaint was not sworn until June of 1986. At the time of these offenses, the statute of limitations for aggravated sexual battery was four years. Tenn. Code Ann. § 40-203 (Supp. 1981); see Morgan v. State, 847 S.W.2d 538, 540 (Tenn. Crim. App. 1992). Counsel testified that he did not move to dismiss the aggravated sexual battery charge because he believed the trial court would have then refused to charge any lesser included offenses on the remaining aggravated rape charges. According to counsel, he did not want such an "all or nothing"

situation. The court subsequently charged all lesser included offenses, and the jury convicted the appellant of seven counts of aggravated rape and two counts of aggravated sexual battery.

At the hearing on the motion for a new trial, the appellant, with new counsel, moved to dismiss both aggravated sexual battery convictions on the basis of the statute of limitations. The trial court dismissed the convictions. On motion of the appellant, the court also granted judgments of acquittal as to two of the aggravated rape convictions for insufficient evidence. The remaining aggravated rape convictions were sustained and affirmed on appeal. As a result, even if trial counsel was deficient in this regard, the dismissal of the convictions in question removed any prejudice suffered by the appellant.

II

In his statement of the issues, the appellant questions whether it is “constitutionally and procedurally prohibited for a judge not conducting a [post-conviction] hearing to render an initial decision upon a transcript of the evidence.” The issue is an apparent reference to the designation of Judge Axley following the death of Judge Garrett, who had presided over the appellant’s trial and the two post-conviction hearings. Judge Axley entered findings of fact and conclusions of law before denying the petition.

The appellant did not register any objections to the proceedings before the trial court. Tenn. R. App. P. 36(a). More importantly, the issue is not supported by argument, citations to the record, or citations to authority in his brief. See Tenn. R. App. P. 27(a)(7). All of the foregoing result in a waiver of the issue at this stage of the proceedings. See State v. Dickerson, 885 S.W.2d 90 (Tenn. Crim. App. 1993); Taylor v. State, 875 S.W.2d 684 (Tenn. Crim. App. 1993); State v. Killebrew, 760 S.W.2d 228 (Tenn. Crim. App. 1988).

The judgment is affirmed.

William M. Barker, Judge

John K. Byers, Senior Judge

F. Lee Russell, Special Judge