

NO. 73839-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

H.A.S.,

Appellant.

FILED

Sep 06, 2016

Court of Appeals

Division I

State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

BRIEF OF RESPONDENT

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A. ISSUES

H.A.S. claims it was ineffective assistance of counsel for his attorney to fail to make a Confrontation Clause objection to a doctor's testimony relating a diagnosis made by a non-testifying physicians assistant. Where the diagnosis was from a medical record that was not prepared for the primary purpose of creating an out-of-court substitute for trial testimony, and was therefore nontestimonial, has H.A.S. failed to show that his attorney was constitutionally ineffective by not objecting? Even if his attorney's performance was deficient for failing to object, has H.A.S. failed to show prejudice when substantial bodily harm was established by other untainted evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Sixteen-year-old H.A.S. was charged as a juvenile with assault in the second degree. CP 4-7. The State alleged that on or about March 26, 2014, H.A.S. intentionally assaulted I.M. and thereby recklessly inflicted substantial bodily harm. CP 4.

After a fact finding hearing, the trial court found H.A.S. guilty of second degree assault. CP 25-26.

2. SUBSTANTIVE FACTS

Travis Tilford is a Federal Way police officer who on March 26, 2014, was assigned to Thomas Jefferson High School as a school resource officer. RP¹ 26, 29, 34. Tilford was standing with the Dean of Students, Chris Storm, in the cafeteria when a female student ran to them and yelled that there was a fight. RP 36. Tilford then saw a large crowd gathered in a circle. RP 36. Tilford saw that student I.M. was on the ground curled into a fetal position with his hands over his head as H.A.S. stood above him and kicked him in the head. RP 36-37. Tilford ran toward the crowd and he heard students screaming things like, “stop,” “don’t,” “stop beating him,” and “somebody help him.” RP 38. As Tilford ran up he heard H.A.S. say “you’re talking shit about my sister.” RP 36. As Tilford ran toward the crowd, when he was 10-12 feet away, H.A.S. looked at Tilford, who was in full uniform, smiled at him and then kicked I.M. again in the head. RP 39. Tilford testified that I.M. was not fighting back at all. RP 39. When Tilford arrived I.M. was barely conscious. RP 51.

Tilford arrested H.A.S. and asked him what happened. H.A.S. responded in a loud and angry voice: “That little bitch was talking shit about my sister, and I was going to send him and everybody else a message.” RP 75. The incident was captured on surveillance video.

¹ The verbatim report of proceedings consists of two volumes that are consecutively paginated and will be referred to in this brief as “RP __.”

Ex. 1. The video was played in court and Tilford narrated what he saw, including that the incident began when H.A.S. tapped I.M. on the shoulder and then struck him in the face. RP 50. I.M. went down to the floor and H.A.S. continued to assault him. RP 50. The assault included H.A.S. delivering numerous punches to I.M.'s face and head, knees to his head, and grabbing I.M. by the neck and slamming his head against the tile floor. RP 51. The assault went on for about 10 seconds before the female student notified Tilford, and it then took Tilford about 10 seconds to get to the scene. RP 50, 41. At no time did I.M. fight back. RP 51.

I.M. was 16 at the time of the assault. RP 173-74. He testified that he was standing in the lunch line in the cafeteria when H.A.S. came up behind him and asked him if he was [I.M.]. RP 174. When I.M. said that he was, H.A.S. asked him if he knew his sister, Hoda. RP 174. When I.M. said that he did, H.A.S. "sucker punched" him in the face and he fell immediately to the floor. RP 174, 176. I.M. did not know H.A.S. and had never seen him before the assault. RP 176. At the time of the assault, I.M. was only 5'00" and weighed only 109 pounds. RP 176-77.

After falling to the floor, I.M. curled up and tried to cover his head as H.A.S. kicked and punched him repeatedly. RP 177-80. I.M. did not fight back. RP 177. I.M. was able to block some of the punches, but seven or eight landed to his face. RP 179-80. After landing these

punches, H.A.S. began kicking I.M. in the face and head. RP 180. He kicked I.M. on the forehead above the right eye and to the back of his head. RP 180-81. I.M. kept his eyes closed because he was scared, and when he thought it was over he tried to get up, but H.A.S. kicked him again in the face. RP 181-82. Then Officer Tilford and Christian Storm stopped the beating. RP 183. I.M. felt intense pain to his forehead, the back of his head was throbbing, and his lip was bleeding. RP 183-84. I.M. was nauseous and fell down when he tried to get up. RP 192. Mr. Storm told him to stay down. RP 193.

I.M. was taken for emergency medical care. RP 184. While testifying, I.M. identified several pictures of his face and head taken two to five days after the attack, which were collectively admitted as Exhibit 9. RP 186, 189, 191. I.M. testified that he was nauseous for three days after the assault and had a headache for two days. RP 193. It took two weeks for his black eyes to fade, and it took a month for the lump on his forehead to go down. RP 194. The site of the hematoma was still painful to the touch when I.M. testified, more than two months after the assault. RP 194.

C. ARGUMENT

THE TESTIMONY OF DR. LOPEZ DID NOT VIOLATE THE CONFRONTATION CLAUSE AND IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL FOR H.A.S.'S ATTORNEY TO NOT OBJECT.

H.A.S. claims that admission of testimony by Dr. Lopez violated the Sixth Amendment's Confrontation Clause, and that it was ineffective assistance of counsel for his attorney to fail to object. H.A.S.'s arguments are without merit. Dr. Lopez's testimony that the medical records showed a diagnosis of hematoma was not testimonial in nature and therefore was not a violation of the Confrontation Clause. Moreover, H.A.S. was not prejudiced because the trial court's disposition did not depend on that testimony.

1. The Testimony Of Dr. Lopez.

Dr. Gregory Lopez is an attending physician at Auburn Medical Center. RP 143. Dr. Lopez's undergraduate education was at Harvard and his medical degree from New York University (NYU). RP 143. After obtaining his medical degree, Dr. Lopez completed a four-year residency in emergency medicine at NYU. RP 143. His specialty is emergency medicine and he supervises physicians assistants in the emergency department at Auburn Medical Center. RP 144. One of the physicians assistants supervised by Dr. Lopez treated I.M. on the day of the assault,

but Dr. Lopez did not see I.M. RP 145-47. Dr. Lopez signed off on the assistant's medical record of her examination of I.M., and Dr. Lopez testified from the medical record that the diagnosis was a head injury with a hematoma, and swelling to the back of the scalp and superficial abrasions. RP 151, 159.

The diagnoses from the medical record were admitted under the business records exception after a hearsay objection by H.A.S. RP 151. H.A.S did not object on the basis of the Confrontation Clause. Exhibit 8, the medical record itself, was not admitted. Dr. Lopez testified that medical records of the type created in I.M.'s case are produced for every patient regardless of whether there was a criminal act that caused the injury. RP 150.

Aside from his reliance on the medical report for I.M.'s diagnosis, Dr. Lopez provided testimony about hematomas generally without reference specifically to I.M. or the work of the physicians assistant.² RP 151-58.

² Much of Dr. Lopez's testimony was clearly that of an expert witness. H.A.S. complains that "Dr. Lopez was not listed as an expert witness on the State's witness list." BOA at 2. What H.A.S. refers to as a witness list was simply an email from the prosecutor to juvenile court staff. CP 37-38. H.A.S. also complains that Dr. Lopez was never "ruled qualified by the Court as an expert witness," (BOA at 12) but provides no authority that suggests a court must make such a pronouncement before allowing expert testimony. Dr. Lopez was clearly qualified as an expert in emergency medicine. At trial, H.A.S. did not object to the expert testimony. Whether Dr. Lopez was properly allowed to testify as an expert is not a subject of this appeal.

2. The Trial Court's Findings Of Fact And Conclusions Of Law.

In finding H.A.S. guilty of assault in the second degree, the trial court noted that substantial bodily harm was defined as:

Bodily injury that involves a temporary but substantial disfigurement or temporary, substantial loss or impairment or function of any bodily part or organ, or that causes a fracture of any bodily part.

RCW 9A.04.110(4)(b); CP 34. The court noted that there was no evidence of temporary but substantial loss or impairment of the function of any bodily part or organ, or of a fracture of any body part. RP 244; CP 34. However, the court cited State v. McKague, 172 Wn.2d 802, 262 P.3d 1225 (2011), in finding that I.M.'s injuries constituted a temporary but substantial disfigurement and was, therefore, substantial bodily harm. RP 244-45; CP 34. In McKague, the supreme court held that the assault victim's "facial bruising and swelling lasting several days, and the lacerations to his face, the back of his head, and his arm were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement." 172 Wn.2d at 806 (citations omitted). Here, the trial court found it sufficient that, "I.M. had two black eyes, a cut on his lip and a large hematoma on his forehead with about an inch and a half laceration on the hematoma. The hematoma lasted several months." CP 34.

3. Dr. Lopez's Testimony Did Not Violate The Confrontation Clause.

A criminal defendant's right to the assistance of counsel derives from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. Under these provisions, a criminal defense attorney has the constitutional duty to effectively assist his client. In re Yung-Cheng Tsai, 183 Wn.2d 91, 99, 351 P.3d 138 (2015) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To prevail on a claim of ineffective assistance of counsel, H.A.S. must establish both deficient performance and resulting prejudice. Strickland, at 687. To show deficient performance, he must show that his counsel's performance fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). In judging the performance of trial counsel, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

To show prejudice, H.A.S. must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Id. If an appellant fails to establish one prong of the

Strickland test, a reviewing court need not consider the other prong. Id. at 697.

H.A.S. alleges that his attorney provided ineffective assistance of counsel by failing to make a Confrontation Clause objection to Dr. Lopez’s hearsay testimony, based on a medical record, that another health professional had diagnosed a hematoma. The Confrontation Clause of the Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” State v. Doerflinger, 170 Wn. App. 650, 655, 285 P.3d 217 (2012) (quoting U.S. CONST. amend. VI). “[T]he ‘principle evil’ at which the clause was directed was the civil-law system’s use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases.” Id. at 655 (citations omitted). This denies the defendant the opportunity to test his accuser’s assertions “in the crucible of cross-examination.” Id. at 655 (quoting Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). But not every out-of-court statement used at trial implicates the Confrontation Clause. The right of confrontation is implicated only by a witness who bears testimony:

[T]he scope of the clause is limited to “witnesses against the accused—in other words, those who bear testimony. Testimony, in turn, is typically [a] solemn declaration or

affirmation made for the purpose of establishing or proving some fact.”

Id. at 655 (quoting Crawford, 541 U.S. at 51).

The Supreme Court has recognized that statements are not testimonial when made under circumstances objectively indicating that their primary purpose is to enable police assistance to meet an ongoing emergency. Id. at 656 (citing Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). The existence of an ongoing emergency is relevant in determining the primary purpose of such statements because the emergency focuses the declarants on something other than “prov[ing] past events potentially relevant to later criminal prosecution.” Id. at 656 (citing Michigan v. Bryant, 562 U.S. 344, 361, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (quoting Davis, 547 U.S. at 822)).

However, the Supreme Court has also recognized that “there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony,” and that “[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the [c]onfrontation [c]lause.” Doerflinger, 170 Wn. App. at 656 (citing Bryant, 131 S. Ct. at 1155, 1166-67).

Here, the State acknowledges that there was no ongoing police emergency when the physicians assistant diagnosed and recorded I.M.'s injury as a hematoma. The primary purpose of the statement was simply creation of a medical record of the injury, not the creation of "an out-of-court substitute for trial testimony." Therefore, Dr. Lopez's testimony that I.M.'s diagnosis was a hematoma did not implicate the Confrontation Clause. In Doerflinger, a case quite similar to the case at bar, this Court reached that very conclusion.

In Doerflinger, this Court held that a doctor's testimony that a non-testifying radiologist had diagnosed a nasal fracture was nontestimonial and did not violate the Confrontation Clause. 170 Wn. App. at 661. This Court reasoned:

Thus, Clark³ fails to establish that the primary purpose of the radiology finding was to create " 'an out-of-court substitute for trial testimony.' " It is therefore not testimonial and the limitations of the Confrontation Clause do not apply to its admission.

Id., (quoting Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 2243, 183 L. Ed. 2d 89 (2012)) (quoting Bryant, 131 S. Ct. at 1155). In rejecting Clark's claim, this Court distinguished two cases heavily relied on by H.A.S., Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and Bullcoming v. New Mexico, 564 U.S. 647,

³ Doerflinger involved codefendants Todd Anthony Doerflinger and Tyson Monte Clark.

131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). The statements held to be testimonial and in violation of the Confrontation Clause in both of those cases were *certified* statements that had been created for “the sole purpose of providing evidence against a defendant.” Doerflinger, 170 Wn. App. at 659-60 (citations omitted).

...[I]n Bullcoming, the forensic report certifying that the defendant’s blood contained a blood alcohol concentration above the legal limit “ ‘contain[ed] a testimonial certification, made in order to prove a fact at a criminal trial,’ ” and in Melendez-Diaz, the “ ‘certificates of analysis’ ” establishing that the substance found in the defendant’s possession was cocaine were executed under oath before a notary.

Doerflinger, at 660 (citations omitted). In contrast, in Doerflinger, regarding the findings of the non-testifying radiologist, this Court stated:

[T]he radiologist’s findings are distinguishable from such testimonial statements. They were prepared not to establish Clark’s culpability, but to determine the extent of [the victim’s] injuries. Nor were they prepared in the form of an extrajudicial sworn or certified statement to be used as a substitute for testimony in court.

170 Wn. App. at 660. Indeed, Melendez-Diaz specified that “medical records created for treatment purposes ... would not be testimonial under our decision today.” Doerflinger, at 661 (quoting Melendez-Diaz, 557 U.S. at 312 n.2).

In Doerflinger, this Court also distinguished another case relied on by H.A.S., State v. Jasper, 174 Wn.2d 96, 274 P.3d 876 (2012). Unlike

medical records created for treatment purposes, “the affidavits held to be testimonial in Jasper were sworn statements of a records custodian that concluded that a driver’s license was suspended and were created to serve as a means to establish a fact to be proven at trial.” 170 Wn. App. at 660. Jasper is clearly inapplicable to the case at bar.

The only testimony by Dr. Lopez that H.A.S. specifically alleges was in violation of the Confrontation Clause was his testimony that I.M. was diagnosed with a hematoma. See Brief of Appellant at 5-7. H.A.S., in his briefing, includes a portion of Exhibit 8, the medical record, which was not admitted at trial and was not the subject of testimony.⁴ From this, H.A.S argues that “both Dr. Lopez and the PA were aware that IM had been beaten up, and this, that there was likelihood that the medical record and any future testimony about IM’s medical condition would be a part of a future criminal proceeding.” BOA, at 10. But an awareness by medical personnel that a criminal act may underlie an injury, and that a criminal proceeding might ensue, does not meet the standard for testimonial evidence — that the “primary purpose” of the record was to create “an out-of-court substitute for trial testimony.” Doerflinger, at 661. Dr. Lopez

⁴ “IM is a 16 year old male who presents after an assault at school today. Apparently, his girlfriend and another girl had a fight yesterday, the other girl told her boyfriend to come and beat him up. He approached him outside the school, not (sic) into the ground, pushed him down and kicked him in the head two times in the front and two times in the back...he was also punched in the mouth...the police were at the scene.” BOA, at 10.

testified that medical records of the type at issue are produced for every patient regardless of whether there was a criminal act that caused the injury. RP 150. There was no evidence to the contrary.

To prove ineffective assistance of counsel based on the failure to object to evidence, H.A.S. must show that the failure to object fell below prevailing professional norms, that the objection would likely have been sustained, and that the result of the trial would probably have been different if the evidence was not admitted. State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)). In this case, the lack of a Confrontation Clause objection did not fall below prevailing professional norms, given that the evidence was nontestimonial. Such an objection would not likely have been sustained.

Further, even if H.A.S. could show deficient performance, he cannot establish prejudice from the mere admission of evidence that another health care professional had diagnosed I.M. with a hematoma. Here, in finding that substantial bodily injury had been established, the trial court did not rely on the prong involving a temporary, substantial loss or impairment or function of any bodily part or organ, or fracture of any bodily part. Rather, the court found that as a result of the assault I.M. had

suffered a substantial but temporary disfigurement, a finding not dependent on medical testimony.

The trial court's reference to McKague, supra, in support of its finding that I.M. suffered substantial but temporary disfigurement was appropriate. In McKague, a challenge to the sufficiency of the evidence of substantial bodily harm to support a second degree assault conviction, the supreme court held that "[the victim's] resulting facial bruising and swelling lasting several days, and the lacerations to his face, the back of his head, and his arm were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement." 172 Wn.2d at 806. See, also, State v. Hovig, 149 Wn. App. 1, 5, 13, 202 P.3d 318, review denied, 166 Wn.2d 1020, 217 P.3d 335 (2009) (red and violet teeth marks lasting up to two weeks constituted substantial bodily injury); State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruises from being hit by shoe were temporary but substantial disfigurement).

Here, "overwhelming untainted evidence" admitted at this bench trial would have resulted in H.A.S.'s conviction for assault in the second degree without Dr. Lopez's testimony. In addition to the unrebutted testimony that H.A.S. savagely attacked I.M. with repeated punches and kicks, which was recorded on surveillance video, the evidence established that H.A.S. caused I.M. temporary but substantial disfigurement. Other

testimony and photographic evidence proved that the assault left I.M. with two black eyes that lasted for two weeks, a cut lip, and a significant protruding lump on his forehead, which included an inch and a half laceration, that did not subside until a month later. This evidence was sufficient to establish a temporary but substantial disfigurement.

H.A.S. has failed to overcome the strong presumption that his attorney provided reasonable professional assistance. He has failed to show that his lawyer's performance was deficient and he has also failed to establish prejudice.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm H.A.S.'s conviction for assault in the second degree.

DATED this 6 day of September, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, John Rodney Crowley, containing a copy of the Brief Of Respondent, in STATE V.HAIDER AL-SHIBLAWI, Cause No. 73839-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

A handwritten signature in black ink, appearing to be "John Rodney Crowley", written over a solid horizontal line.

Done in Seattle, Washington

Date : Sept. 6, 2016