Opinion issued April 5, 2001 withdrawn; Affirmed and Substituted Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-00413-CR

———————————

HANS KEITH BRODERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 185th District Court
Harris County, Texas
Trial Court Cause No. 798,351

S U B S T I T U T E D O P I N I O N

The opinion issued in this case on April 5, 2001 is withdrawn, and the following opinion is issued in its place. Appellant's motion for rehearing en banc is denied as moot.

Hans Keith Broderson appeals a conviction for injury to a child[1] on the grounds that the trial court: (1) lacked subject matter jurisdiction; (2) erred in overruling appellant's objection

---

[1] Appellant was charged by indictment with intentionally and knowingly causing serious bodily injury to a child, found guilty by a jury of recklessly causing serious bodily injury to a child, and sentenced by the trial court to twelve years confinement.

to the testimony of an assistant district attorney; and (3) improperly commented on a question posed by the jury during its deliberations. We affirm.

Jurisdiction

Appellant's first issue contends that the trial court did not have subject matter jurisdiction over the case because appellant was indicted beyond the applicable statute of limitations.

A felony indictment alleging the offense of injury to a child must be presented within three years from the date of the commission of the offense. TEX. CODE CRIM. PROC. ANN art. 12.01(6) (Vernon Supp. 2001). However, the time during the pendency of an indictment, information, or complaint is not computed in the period of limitation. *Id*. at art. 12.05(b).

In this case the offense of injury to a child was alleged to have occurred on or about February 1, 1995. The original indictment was filed on December 1, 1997, within the three year limitations period, and was dismissed on November 30, 1998. The second indictment, filed on November 18, 1998, included an additional manner and means of committing the offense but was brought under the same penal statute.[2] Because the limitations period had therefore been tolled by the first indictment when the second indictment was filed, the second

---

[2] The first indictment, in a single paragraph, alleged that appellant seriously injured the complainant by "striking [him] with his hand, foot, hip and by a manner and means unknown to the Grand Jury." The second indictment, in three paragraphs, alleged that appellant seriously injured the complainant by: (1) "striking [him] with his hand"; (2) "striking [him] with his foot"; and (3) "failing to provide proper medical care for [him] , which [appellant] had a duty to provide." *See* TEX. PEN. CODE ANN. § 22.04(a)(1), (b)(1) (Vernon Supp. 2001) (a person commits the offense of injury to a child if he causes serious bodily injury to a child or does so by omission if the actor has a statutory duty to act); TEX. FAM. CODE ANN. § 151.003(a)(3) (Vernon 1996) (a parent has a duty to support their child including, among other things, providing the child with medical care). Although the second indictment added an allegation of injury by omission based on the statutory duty to provide medical care under the Family Code, that allegation, like those in the first indictment, was brought under section 22.04 of the Penal Code.

indictment was not filed outside the period of limitations.[3] Accordingly, appellant's first issue is overruled.

Testimony of Other Assistant District Attorney

Appellant's second issue contends that the trial court erred by overruling his objection to the testimony of Kris Moore, an assistant district attorney, because it was in violation of Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct and his due process rights.[4] Appellant claims that the State's prosecutorial misconduct, in calling Moore to testify in the State's case-in-chief, deprived appellant of a fair trial because there was no way to overcome the indicia of credibility and reliability of an additional prosecutor speaking from the witness stand.[5] Appellant contends that the testimony of Moore unfairly invoked the prestige of the Harris County District Attorney's office, which enhanced her credibility as a witness and influenced the jury to convict.

Rule 3.08 provides that a lawyer generally shall not accept or continue employment in an adjudicatory proceeding if he believes that he may be a necessary witness to establish an essential fact on behalf of his client. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08(a) (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9). However, an alleged disciplinary rule violation by an opposing party does not require reversal of a conviction unless the defendant can show that the alleged violation

---

3 *Ex parte Slavin*, 554 S.W.2d 691, 692-93 (Tex. Crim. App. 1977) (holding that under article 12.05(b) the time during which a first indictment was pending in the trial court tolled the statute of limitations because the second indictment was brought under the same penal statute as the first); *see Prince v. State*, 914 S.W.2d 672, 674-75 (Tex. App.—Eastland 1996, pet. ref'd); *Mata v. State*, 991S.W.2d 900, 903 (Tex. App.—Beaumont 1999, pet. ref'd).

4 Because appellant's objection at trial was based solely on a conflict due to Ms. Moore's employment at the District Attorney's office, no due process complaint was preserved for our consideration apart from that alleged conflict.

5 In support of this contention, appellant's motion for rehearing cites *United States v. Young*, 470 U.S. 1 (1985). However, *Young* was not cited in appellant's appellate brief and addresses the propriety of closing argument, not a prosecutor testifying as a witness.

affected his substantial rights or deprived him of a fair trial.[6] *House v. State*, 947 S.W.2d 251, 252 (Tex. Crim. App. 1997). Therefore, we need not determine whether the State's conduct violated a disciplinary rule, but only whether appellant has shown actual prejudice therefrom. *Id*.

In this case, Moore testified generally that a parent or guardian has a duty under the Family Code to provide medical care to their child.[7] *See* TEX. FAM. CODE ANN. § 151.003 (Vernon 1996). Moore did not testify that appellant failed to provide medical care to his child or otherwise comment about the facts of this case. Her testimony was of little, if any, significance to the issues in this case and was not of a type for which the credibility of the witness mattered. Nor did appellant's counsel cross-examine Moore. Under these circumstances, we are not persuaded that the alleged disciplinary rule violation affected appellant's substantial rights or deprived him of a fair trial. Accordingly, appellant's second issue is overruled.

Comment on Question Posed by Jury

Appellant's third issue claims that the trial court improperly commented on a question raised by the jury during deliberations in violation of Texas Code of Criminal Procedure articles 38.05[8] and 36.27.[9] During deliberations, the jury sent the judge the following note:

---

6 The principal concern in this context is the possible confusion for the trier of fact as to whether statements by an advocate-witness should be taken as evidence or argument. TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 4. However, Rule 3.08 is an ethical standard, and is not well suited as a standard for procedural disqualification. *Id*. cmt. 9. In addition, it should not be used as a tactical weapon. *Id*. cmt. 10. Moreover, Rule 3.08 operates to disqualify lawyers from acting as counsel, not as a witness. *House v. State*, 909 S.W.2d 214, 217 (Tex. App.—Houston [14th Dist.] 1995), *aff'd*, 947 S.W.2d 251 (Tex. Crim. App. 1997).

7 Appellant did not object at trial to the *content* of Moore's testimony apart from her alleged conflict of interest in testifying at all.

8 *See* TEX. CODE CRIM. PROC. ANN. art. 38.05 (Vernon 1979) (prohibiting a judge from discussing or commenting upon the weight of the evidence when ruling upon its admissibility, or making any remark calculated to convey to the jury his opinion of the case).

9 *See* TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 1981) (specifying the procedure to be followed when the jury wishes to communicate with the trial court).

> Clarification is needed with regard to the multi-level charges.
>
> If we cannot all agree to the most serious charge, do we then have to move to the second charge[?]
>
> If we do, then will we who felt otherwise - that is, that he was guilty of the more serious charge - have the opportunity to say so when we are asked if we found him guilty of the lesser charge[?] In the event that we are polled individually.

The trial court replied: "If you all cannot agree to the more serious charge you must then move to the lesser. Your verdict must be unanimous." Appellant argues that the trial court's response implicitly informed the jury that it thought the defendant was guilty of at least one of the lesser included offenses. Additionally, appellant claims the trial court invaded the thought process of the jury by telling it that the verdict must be unanimous.

To preserve error by the trial court in making a comment which allegedly conveys to the jury its opinion of the case, the defendant must object to the trial court's comment.[10] Because appellant failed to object to the comment of which he complains, he has waived any error as to article 38.05.

Appellant further contends that the trial court did not follow the mandatory terms of article 36.27 because it failed to have the court reporter record the trial court's response to the jury note and whether appellant and his counsel were present when the trial court responded. In the absence of a showing in the record to the contrary, we presume the trial court's response was made in open court, in appellant's presence, and that he had an opportunity to object. *See Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995); TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 1981). In this case, appellant failed to object, file a bill of exception, file a motion for new trial, or otherwise develop a record to show that the trial court's communication with the jury was not in compliance with article 36.27. *See Verret v. State*, 470 S.W.2d 883, 887 (Tex. Crim. App. 1971); *Harris v. State*, 736 S.W.2d 166, 166-67 (Tex. App.—Houston [14th Dist.] 1987, no pet.). Because appellant did not, therefore,

---

[10] *See Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995) (holding that failure to object resulted in waiver of complaint); *Woods v. State*, 569 S.W.2d 901, 904 (Tex. Crim. App. 1978) (same); *Minor v. State*, 469 S.W.2d 579, 580 (Tex. Crim. App. 1971) (same).

preserve his article 36.27 complaint on the trial court's response, his third issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Anderson, Fowler and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).