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[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-94,433-01

EX PARTE ANDREW LEWIS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 2016-0335-A IN THE 217TH/159TH DISTRICT COURT FROM ANGELINA COUNTY

Per curiam.

ORDER

Applicant was convicted of two counts of reckless injury to a child causing serious bodily injury and one count of intentional or knowing injury to a child causing serious bodily injury. The Twelfth Court of Appeals affirmed his conviction. *Lewis v. State*, No. 12-16-00319-CR (Tex. App.–Tyler Sept. 6, 2017, pet. ref'd). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

The trial court held a hearing and adopted Applicant's proposed findings of fact and conclusions of law. The court found that, with respect to the third count, Applicant's claims of ineffective assistance of trial

counsel had merit and recommended granting a new trial. We disagree.

On post-conviction review of habeas corpus applications, the convicting court is the "original factfinder" and this Court is the "ultimate factfinder." *Ex parte Storey*, 584 S.W.3d 437, 439 (Tex. Crim. App. 2019). In most circumstances, we defer to the trial judge's findings of fact because the judge is in the best position to assess witnesses' credibility. *Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017). However, if our independent review of the record reveals circumstances that contradict or undermine the trial judge's findings, we may exercise our authority to enter contrary findings and conclusions. *Storey*, 584 S.W.3d at 440. We review *de novo* conclusions of law. *Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014).

Applicant contends in relevant part that defense counsel failed to obtain a doctor's assistance to review the child's medical records, help counsel prepare for cross-examination, or testify. As a result, counsel failed to impeach the State's doctors with evidence in the hospital records that contradicted their testimony. The trial court finds and concludes that no reasonable trial strategy could justify defense counsel's omission in failing to call a pediatrician or radiologist to impeach the State's doctors' testimony.

However, Applicant has not shown prejudice. Both State's doctors testified at trial that the child's "shrill cry," loss of alertness, and going limp while in Applicant's care would have immediately followed the

infliction of a brain injury. The swelling on the child's forehead originated shortly before the child went to the hospital because swelling appears quickly and subsides quickly. Applicant's doctors who testified at the habeas hearing did not contradict this testimony.

Applicant also asserts that defense counsel should have obtained school and medical records showing that, contrary to the State's doctor's "grim prognosis," the child "had no medical problems" and was doing well. Applicant neglects to mention that the medical records admitted into evidence at trial showed that in June 2014, a medical report concluded the child had "Mild left sided lower extremity hypertonicity most likely sequilae of the head trauma. But expect to have minimal impact of mobility and ambulation." And in April 2015, a doctor noted that the child's "exam was notable for increased left sided tone predominantly in the leg that is most likely sequilae of the head trauma. Based on her exam findings she has a handcapping condition diagnosed as spastic monoplegic cerebral palsy." 1 WRIT .pdf 191. An EMT who he responded to the 9-1-1 call noted that "all her movements tracked to the left side," which he explained indicated a brain injury. 1 WRIT .pdf 96.

Defense counsel acknowledged in the habeas proceedings that a medical expert would have been helpful. But he also stated that at trial, he was focused on the identity of the abuser. He believed the jury would conclude that someone caused "serious bodily injury by criminal means," to the child, so he wanted to create doubt that the abuser was Applicant.

In light of the symptoms described at trial by Applicant, the child's grandfather, and the EMT—plus the reports of subdural bleeding, the 2014 report of a condition likely related to head trauma, and the 2015 report of spastic monoplegic cerebral palsy likely resulting from the head injury—it is unlikely that a defense doctor's testimony such as Applicant describes, or a cross-examination informed by consulting with a doctor, would have affected the result. *See* TEX. PENAL CODE § 6.04; *Honea v. State*, 585 S.W.2d 681, 685 (Tex. Crim. App. 1979) (overruled on other grounds in *Thompson v. State*, 236 S.W.3d 787, 800 (Tex. Crim. App. 2007).

Therefore, Applicant has not established ineffective assistance of trial counsel for failing to obtain the assistance of a doctor. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

Applicant's remaining allegations are without merit.

Relief is denied.

Filed: February 1, 2023
Do not publish

IN THE 217TH DISTRICT COURT
OF ANGELINA COUNTY, TEXAS

EX PARTE	§	
	§	CAUSE NO. 2016-0335-A
ANDREW LEWIS	§	

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having considered the application for a writ of habeas corpus, the brief, the exhibits, and the official court records and testimony from the trial and the habeas corpus proceeding, enters the following findings of fact and conclusions of law:

I.

THE TRIAL

A. The Indictment

1. The indictment alleged that Lewis intentionally and knowingly caused serious bodily injury to A.L., a child younger than 14, by striking her with an unknown object, applying pressure to her chest area, dropping her, or jerking or twisting her leg on or about January 28, 2014; by striking her with an unknown object or applying pressure to her clavicle area on or about March 10, 2014; and, by striking her with an unknown object or dropping her on or about March 25, 2014 (1 C.R. 23-24).

B. The State's Case

2. Amber Minkner became pregnant, married Lewis, and they moved in with her parents, Craig and Michelle Minkner (3 R.R. 181-84).

3. A.L. was born on January 6, 2014 (3 R.R. 184). She was 78 days old on March 25, 2014 (4 R.R. 21).

4. Lewis, who worked part-time, was A.L.'s primary caretaker, as Amber worked full-time (3 R.R. 184-86). Michelle took care of A.L. when both parents were unavailable (3 R.R. 189).

5. Michelle testified that she noticed a bruise on A.L.'s eye on Friday, March 21, 2014 (4 R.R. 74-75). She asked Lewis what happened, and he responded that he did not know (4 R.R. 75). She did not believe that the bruise required medical treatment and did not suspect abuse (4 R.R. 80-81).

6. Craig and Michelle took A.L. to church on Sunday, March 23 (3 R.R. 114, 116; 4 R.R. 83). April Wallace, a friend, noticed that A.L. had a blood blister on the white of her eye and faint bruising on her head but did not believe that it was necessary to call 911 or take her to the hospital (3 R.R. 114, 116, 124). Craig also noticed the bruise at that time but was not concerned, as Lewis and Amber were supposed to take her to the doctor on Monday (3 R.R. 189-90, 216).

7. A.L. did not go to the doctor on Monday, March 24 (3 R.R. 190). The office manager for Angelina Pediatrics testified that A.L.'s parents did not call the office

in March of 2014 or schedule an appointment for her (3 R.R. 157-58, 160).

8. Craig and Michelle were a little upset but thought that Lewis would take A.L. to the doctor on Tuesday (3 R.R. 222-23).

9. A.L. looked the same on Monday as she did on Sunday (4 R.R. 65-66).

10. Craig testified that Andrew came into his bedroom on the morning of Tuesday, March 25, and said that something was wrong (3 R.R. 196). A.L. was "very limp," "shook," and "felt dead" before she "came back to" (3 R.R. 196-97). Craig told Lewis to call 911 (3 R.R. 196). Lewis said that he had been feeding her and did not know what happened (3 R.R. 197).

11. Michelle was at work, and Amber was at school at the time (3 R.R. 197).

12. Ivan Tapia, a paramedic, arrived at the residence in response to a "baby not breathing" call (3 R.R. 60-62). Lewis was holding A.L., who had bruises on the back and side of her head (3 R.R. 62-63). Lewis agreed that Tapia should take her to the hospital (3 R.R. 63).

13. Lufkin Police Department officer Cody Jackson went to Memorial Hospital, observed bruises on the sides of A.L.'s head and swelling on the back of her head and left eyelid, and took photos (3 R.R. 45-46).

14. Lewis told officer Jackson that A.L. fell off the bed when she was a few weeks old but, other than that, nothing had happened to her (3 R.R. 48).

15. Lewis told Hudson Police Department Chief Jimmy Casper at the hospital that he noticed bruises on A.L.'s face on March 21 and intended to take her to the doctor on March 24 but could not get an appointment (3 R.R. 79-81, 85-86, 89-90). On March 25, he gave her a bottle; she had a seizure; and he hollered for Craig, who told him to call 911 (3 R.R. 87).

16. A.L. was transported to Texas Children's Hospital (TCH) in Houston (3 R.R. 45).

17. Patrick Brice, a Child Protective Services (CPS) investigator, interviewed members of A.L.'s family at TCH (3 R.R. 97-98). Lewis said that A.L. had a seizure; he called 911; and, while they were in the ambulance, the "life came back to her" (3 R.R. 100-01). Lewis was shocked when Brice told him that she had a subdural hematoma and a fractured femur, clavicle, and ribs (3 R.R. 101). He denied hurting her and did not believe that anyone in the family would do so (3 R.R. 101-02).

18. Dr. Marcella Donaruma, a child abuse pediatrician and assistant professor of pediatrics at Baylor College of Medicine, testified that she examined A.L. on March 26, 2014, reviewed the chart, and met with the family (4 R.R. 17, 21-22).

19. Dr. Donaruma testified that A.L. had multiple bruises on her face, a "great deal of blood" inside her head, liver trauma, and broken bones in her chest, hand, and leg (4 R.R. 24, 27). She was born cesarean because she was breech (4 R.R. 29). The clavicle injury and the fractures were not caused during birth; if they

had been, they would have healed by March 26 (4 R.R. 29-30). The rib fractures probably were caused accidentally by forceful chest compressions (4 R.R. 30-31). The two leg fractures were caused by a twisting type of force that is indicative of child abuse (4 R.R. 32-33). The liver injury probably was caused by blunt force trauma (4 R.R. 33). Old and fresh collections of blood over the brain indicated two head injuries (4 R.R. 34). A head injury of this nature typically is caused by a forceful whiplash action consistent with someone holding a screaming child around the chest and shaking her until she stops screaming. Donaruma provided her opinions that A.L. had been abused and had sustained serious bodily injury (4 R.R. 36, 60).

20. Dr. Donaruma also testified that a child who sustains brain trauma will show an immediate change in her level of consciousness but might not have a seizure until hours or even days later (4 R.R. 40, 45-46). Lewis's account that he fed A.L., she shrieked, he tried to burp her, and she went limp is not plausible, as she would not have been able to eat if she had a brain injury at the time of the feeding (4 R.R. 41). Thus, her brain was injured after she took the bottle. Lewis inflicted the injury, as he was the only person with her when she had the seizure (4 R.R. 43).

21. Dr. Randell Alexander, a child abuse pediatrician and professor of pediatrics at the University of Florida School of Medicine, reviewed A.L.'s medical records and testified that her leg had been twisted twice, as there were two breaks (4 R.R. 121-22); that there is a statistical likelihood that only one person

abused her (4 R.R. 129-30); and that, based on Lewis's admission that he was alone with her when she had the seizure, her brain was injured after she took the bottle (4 R.R.134, 138-39).

22. Samantha Skinner, a foster care supervisor, observed Lewis, Amber, and A.L. interact in the visitation room at the CPS office (3 R.R. 236-37). A.L. appeared' to be comfortable when Amber held her but stiffened and became rigid when Lewis held her (3 R.R. 256-57).

23. Janae Wojasinski, a licensed professional counselor who does contract work for CPS, testified that Lewis and Amber said that they were relinquishing their parental rights on the advice of counsel to lessen the chance of criminal prosecution (3 R.R. 272-73). They denied causing the injuries, which they thought were accidental (3 R.R. 274).

C. The Co-Defendant's Case

24. Amber testified that she and Lewis started dating in high school, and she became pregnant at age 17 (5 R.R. 14). They moved in with her parents and got married (5 R.R. 14-15). A.L. was born in January of 2014 (5 R.R. 15).

25. Amber testified that her best friend, Bailey Legg, was feeding A.L. in her presence on January 26, 2014, when A.L. started choking (4 R.R. 188-89, 192). Amber called 911 (4 R.R. 192; 5 R.R. 17).

26. Josh Morris, a paramedic, arrived and determined that A.L. was not in physical or respiratory distress (4 R.R. 209-10). He did not observe any sign of abuse (4 R.R. 212).

27. Lewis was not at home at the time of this incident (5 R.R. 85).

28. A.L. went to the pediatrician for wellness checks at ages five days, two weeks, and two months; she was normal except for being tongue-tied (4 R.R. 229-31; 5 R.R. 21-22).

29. Amber testified that she noticed a bruise on A.L.'s eye when she and Lewis had lunch on March 21 (5 R.R. 27-28). She asked him what happened, and he responded that he did not know (5 R.R. 28). She told him to take A.L. to the doctor. She did not suspect abuse (5 R.R. 32).

30. Amber testified that Lewis' mother noticed the bruise on March 22 and suggested to Amber that A.L. was anemic (5 R.R. 32-33). Amber told Michelle on March 23 that she would go to the doctor the next day (5 R.R. 34-35).

31. Amber testified that she told Lewis on March 24 that she had scheduled an appointment for A.L. for 2:00 p.m. (5 R.R. 35-36). Lewis said that he could not take her because he had an appointment with a counselor but that he would take her on Tuesday (5 R.R. 36-37). Amber did not consider it to be an emergency (5 R.R. 37).

32. Amber testified that she did not see any new bruises on A.L. when she left for work on March 25 (5 R.R. 39). Craig called her at 9:30 a.m. and said that A.L. had a seizure and was on the way to the hospital. Amber went to the hospital and, from there, to Houston (5 R.R. 39-40).

33. Amber—who has chronic multifocal osteomyelitis, a rare bone disease—testified that she wanted to believe that A.L. has a genetic or medical condition (5 R.R. 41). She did not hurt A.L. or see her parents or Lewis do so (5 R.R. 42-43, 80). She and Lewis voluntarily relinquished their parental rights because a lawyer told them that, if they did, there would be no criminal charges and they possibly could remain in A.L.'s life but, if they did not, and a court terminated their rights, they would face criminal charges and would never see her again (5 R.R. 75-76).

34. Craig and Michelle testified that they did not hurt A.L. or see Amber or Andrew do so (4 R.R. 237-41).

D. The Defense's Case

35. Lewis's sister, Jessica, testified that he was very loving toward A.L., but Amber handled her aggressively (4 R.R. 174-75). Amber blamed Michelle for what happened to A.L.

36. Lewis' mother, Marsha, testified that Amber was rough with A.L. when changing her diaper (4 R.R. 242, 244). She heard Amber say to Michelle during an

argument at the hospital, "You had her the last two weeks. What did you do to her?" (4 R.R. 246). Marsha saw the bruise on A.L.'s eye the previous weekend and suggested that she was anemic (4 R.R. 249-50).

37. Lewis, age 21, testified that he did not injure A.L. and did not know how she got the bruise (5 R.R. 91, 94, 104). He understood that the March 24 doctor's appointment would be rescheduled (5 R.R. 95).

38. Lewis testified that he awoke on the morning of March 25 when A.L. started crying (5 R.R. 97). He tried to feed her, and she appeared to take four big gulps. When he put her on the changing table, her body twitched, her arms shook, and her eyes rolled (5 R.R. 98). He woke up Craig, who told him to call 911 (5 R.R. 99). A.L. became stiff, let out a shrill cry, spit up, and started to breathe normally (5 R.R. 99-100).

39. Lewis testified that he did not injure A.L. and was not accusing anyone else of doing so (5 R.R. 100). His lawyer persuaded him to relinquish his parental rights (5 R.R. 101-02, 116-18).

E. The Court's Charge

40. The court instructed the jury on intentionally and knowingly causing serious bodily injury, recklessly causing serious bodily injury, and negligently causing serious bodily injury as to each count (4 C.R. 234-39).

F. The Arguments

41. The prosecutors argued that A.L. had been abused, as her injuries were in various stages of healing (5 R.R. 194); that Lewis and Amber delayed taking her to the doctor so the bruises would fade (5 R.R. 231); that they told inconsistent stories about how she was injured (5 R.R. 197); that the doctors believe that the most recent brain injury occurred after she took the bottle, when only Lewis was present, as a child cannot swallow after sustaining a traumatic brain injury (5 R.R. 198, 233); that Lewis inflicted the injuries, and Amber failed to protect A.L. (5 R.R. 199, 234); and, that they voluntarily relinquished their parental rights (5 R.R. 238).

42. Amber's lawyer, Ryan Deaton, argued that there was no evidence that A.L. was injured before March 21 (5 R.R. 206-07); that the bruise did not require immediate medical attention (5 R.R. 208); and that, if Lewis injured her, he would not take her to the doctor, no matter how many appointments Amber made, because his sin would be revealed (5 R.R. 201).

43. Lewis' lawyer, John Tunnell, argued that Craig and Michelle were blaming Lewis to protect Amber (5 R.R. 220); that Amber testified that she told Lewis that she made a doctor's appointment, but the office manager testified that she did not (5 R.R. 221); that the injury could have been inflicted while Amber was at home, before Lewis awoke, and the seizure was delayed (5 R.R. 225); and that, although the doctors testified that A.L. could not have swallowed with a

traumatic brain injury, Lewis testified that she spit out the formula (5 R.R. 224).

G. The Verdicts

44. The jury convicted Lewis of recklessly causing serious bodily injury to A.L. on or about January 28 and March 10 and of intentionally causing serious bodily injury to her on or about March 25 (6 R.R. 12-13).

45. The jury acquitted Amber of recklessly causing serious bodily injury but failed to reach a verdict on injury to a child by omission (6 R.R. 13).

II.

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE STAGE

A. The Standard Of Review

46. A habeas applicant has the burden to prove that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. See Strickland v. Washington, 466 U.S. 668, 687-90 (1984). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. at 694. It can be shown by less than a preponderance of the evidence. Id.

B. Deficient Performance

Failure to use medical records to impeach Drs. Donaruma and Alexander and failed to present expert testimony to rebut their opinions.

47. Counsel has a duty to conduct an independent investigation to discover evidence to support the defense. Ex parte Duffy, 607 S.W.2d 507, 518 (Tex. Crim. App. 1980). He must conduct reasonable investigations or reasonably decide that they are unnecessary. Strickland, 466 U.S. 690-91.

48. The verdict depended substantially on the medical evidence. The State's case was circumstantial, as no one testified that Lewis injured A.L.

49. Drs. Donaruma and Alexander provided crucial testimony that A.L. sustained a traumatic brain injury after Lewis, the only person with her at the time, gave her a bottle on March 25, 2014.

50. Defense counsel Tunnell had no medical education or training and had never before tried an injury to a child case (1 H.R.R. 32-33, 35).

51. Tunnell did not consult with or hire a doctor to review the medical records because he assumed that the jury would conclude that A.L. had been injured by criminal acts and, as a result, it was "more a matter of whodunit" (1 H.R.R. 47-48). For that reason, he did not challenge Drs. Donaruma's and Alexander's timeline.

52. Tunnell testified at the habeas hearing that he reviewed the medical records before trial and did not understand everything in them but saw nothing beneficial to Lewis (1 H.R.R. 45-46, 56-57).

53. Dr. Don Schaffer, a pediatrician, and Dr. Frank Powell, a radiologist, reviewed the medical records, radiographic images, and trial testimony; provided affidavits; and testified in the habeas proceeding (1 H.R.R. 112, 162-63; AX 5, 6).

54. Tunnell testified at the habeas hearing that, after reading the affidavits of Drs. Schaffer and Powell, he better understood the importance of hiring a medical expert and agreed that their testimony would have been beneficial (1 H.R.R. 47, 57). He could have asked the court to appoint an expert if Lewis did not have the funds, regrets that he did not do so, and would do so if he were handling the case today (1 H.R.R. 57-58).

55. Drs. Schaffer and Powell would have been available to consult with Tunnell before trial and to testify at trial (1 H.R.R. 111, 180).

56. Drs. Schaffer and Powell are competent doctors, and their testimony at the habeas hearing was credible.

57. Tunnell had a duty to present impeachment evidence to undermine the State's case. Cf. Ex parte Saenz, 491 S.W.3d 819, 829 (Tex. Crim. App. 2016) (counsel ineffective by failing to impeach eyewitness with prior inconsistent statement that he did not see murderer's face); Beltran v. Cockrell, 294 F.3d 730,

734-35 (5th Cir. 2002) (counsel ineffective by failing to impeach eyewitnesses with prior tentative identifications of another person as murderer); Ex parte Ybarra, 629 S.W.2d 943, 949 (Tex. Crim. App. 1982) (counsel ineffective by failing to cross-examine prison inmate about how he could benefit from testifying for the State).

58. Tunnell performed deficiently by failing to consult with and call a pediatrician and a radiologist to testify with regard to the conviction for intentionally causing serious bodily injury to A.L. on March 25, 2014. See Winn v. State, 871 S.W.2d 756, 761 (Tex. App.—Corpus Christi 1993, no pet.) (counsel ineffective by failing to call pathologist to testify that physical evidence was consistent with suicide); Ex parte Overton, 444 S.W.3d 632, 640-41 (Tex. Crim. App. 2014) (counsel ineffective by failing to present expert testimony on sodium intoxication where young child died after consuming large amount of salt); cf. Ex parte Briggs, 187 S.W.3d 458, 469 (Tex. Crim. App. 2005) (guilty plea to injury to a child involuntary where counsel ineffective by failing to hire pathologist to review cause of death before advising defendant to plead guilty).

59. Tunnell could not make a reasonable strategic decision to accept the opinions of Drs. Donaruma and Alexander without investigating the medical evidence.

60. Tunnell did not perform deficiently by failing to consult with and call experts to testify with regard

to the convictions for recklessly causing serious bodily injury to A.L. on January 28 and March 10, 2014. Expert testimony was not necessary to explain the fractures.

Failure to present expert testimony and argue that applicant was not responsible for the complainant's previous head injury.

61. Lufkin Fire Department records reflect that paramedics were dispatched to the Lewis' home on January 26, 2014, because a three-week-old possibly was choking (AX 4).

62. Tunnell asked Dr. Donaruma at trial to discuss what she had referred to as a previous head injury to A.L. (4 R.R. 48). She responded as follows (4 R.R. 48-49):

> The old head injury is challenging. What we have is a milestone in her past medical history when we looked at her medical records that in January she had an event where she was choking and EMS was called to the house. And the child appeared well by the time they arrived, and so my suspicion with the Monday morning quarterback look in March is that at that time the appearance of the blood would coincide with that time frame and the symptoms coincide well with the type of bleeding that we see, so I suspect that is at least one prior event of abusive head trauma.

63. Dr. Donaruma testified that the medical records regarding A.L.'s seizure in January reflected "the same kind of injury" as in March, but "it was a lesser degree, since [A.L.] appeared well to EMS" (4 R.R. 49).

64. Amber testified at trial that her best friend, Bailey Legg, was feeding A.L. in her presence on January 26, 2014, when A.L. started choking (4 R.R. 188-89, 192). Amber called 911 (4 R.R. 192; 5 R.R. 17). A.L. had calmed down and was fine by the time the paramedics arrived (4 R.R. 209-10, 212).

65. Tunnell did not present expert testimony or argue that Lewis was not responsible for any abusive head trauma allegedly inflicted on A.L. on January 26, as he was not at home at the time; and, did not argue that, in view of Dr. Alexander's testimony that there is a statistical likelihood that there was only one abuser, if Amber inflicted head trauma on A.L. in January, it is likely that she also inflicted any head trauma in March.

66. Dr. Schaffer testified at the habeas hearing that, if Dr. Donaruma is correct that A.L. choked in January as a result of abusive head trauma, and Amber was present, but Lewis was not, then Amber was the abuser (1 H.R.R. 120-21).

67. Tunnell performed deficiently by failing to present expert testimony and argue that, if A.L. choked in January as a result of abusive head trauma, Amber inflicted it, which made it more likely that she inflicted any head trauma in March. Such testimony

and argument could have raised a reasonable doubt of Lewis' guilt of this offense.

68. No reasonable strategy could justify these omissions.

Failure to present expert testimony providing alternative explanations for the complainant's fractures.

69. Dr. Donaruma testified at trial that, although A.L. was breech and was born cesarean, her clavicle fracture and other fractures did not occur during birth; that her rib fractures were probably caused accidentally by forceful chest compressions; and, that her two leg fractures were caused by a twisting type of force, which indicates child abuse (4 R.R. 29-33).

70. Tunnell did not present alternative explanations for how the fractures could have occurred.

71. Dr. Schaffer testified at the habeas hearing that the medical records indicate that doctors unsuccessfully attempted a difficult rotation of the fetus several days before A.L. was delivered cesarean, at which time her collarbone could have been fractured (I H.R.R. 113-15). Even if the fracture did not occur at birth, the large amount of callus formation (new bone healing) on the x-rays indicates that it occurred within three or four weeks after she was born (1 H.R.R. 115).

72. Dr. Powell testified at the habeas hearing that the fractures indicated abuse but could not be linked to the time that Lewis was feeding A.L. on

March 25 or any other conduct on his part (1 H.R.R. 175-78).

73. Tunnell did not perform deficiently by failing to consult with and call a pediatrician and a radiologist to provide alternative explanations for how A.L.'s fractures could have occurred and, assuming that the fracture's resulted from abuse, they were not linked to any conduct by Lewis. Expert testimony was not necessary to explain whether Lewis caused the fractures.

Failure to present expert testimony that the complainant's liver was not injured as a result of blunt force trauma.

74. Dr. Donaruma testified at trial that A.L. "had liver trauma that was biochemical. We did not see anything on imaging to reflect gross structural damage, but her liver enzymes were very highly elevated and then resolved over time in a pattern that's most consistent with trauma" (4 R.R. 24).

75. Tunnell did not impeach Dr. Donaruma's testimony that A.L.'s highly elevated liver enzymes were consistent with blunt force trauma.

76. Dr. Schaffer testified at the habeas hearing that Dr. Donaruma ignored indisputable medical evidence indicating that the liver was not damaged as a result of blunt force trauma. When A.L. was admitted to TCH, her x-rays and physical examination were normal, revealed no trauma to the abdomen or injury to the liver, and she had a 101 degree fever (1 H.R.R.

115-16). A fever can cause elevated liver functions and seizures (1 H.R.R. 117). The medical records reflect that A.L. was feeding at 9:50 a.m. (one hour 20 minutes after the 911 call) (1 H.R.R. 118). A child cannot feed with a significant abdominal injury. Dr. Donaruma had no medical basis to conclude that A.L.'s liver was damaged by blunt force trauma in view of the fact that she had a fever and her x-rays and physical examination were normal (1 H.R.R. 117-18).

77. Tunnell testified at the habeas hearing that he should have asked Dr. Donaruma about these portions of the medical records (1 H.R.R. 66).

78. Tunnell performed deficiently by failing to use the medical records to impeach Dr. Donaruma's testimony that A.L.'s elevated liver enzymes were consistent with blunt force trauma and by failing to call a pediatrician to rebut her erroneous opinion. Such testimony and argument could have raised a reasonable doubt of Lewis' guilt of intentionally causing serious bodily injury to a child.

79. No reasonable strategy could justify these omissions.

Failure to use the medical records to impeach Dr. Donaruma's testimony that a CT scan revealed a "great deal" of blood inside the complainant's head and to present expert testimony that her subdural hematomas were not the result of recently inflicted trauma.

80. A key issue was whether A.L.'s subdural hematomas were inflicted on March 25, 2014, or were rebleeds from previous trauma.

81. Dr. Donaruma testified at trial that A.L. presented at TCH with both old and new bilateral subdural blood but did not clarify the relative size of each (4 R.R. 27-28):

> We didn't—what we found was on her CT scan. A CT scan in a living child and in a deceased child will look the same because function is not something a CT scan is very good at finding. What it can see is fluid and it can see blood. ***We saw a great deal of blood inside of Addison's head.*** And so, on both sides of her brain she had collections of blood overlaying the surface of the brain, underneath the bone covering (emphasis added).

82. Tunnell asked Dr. Donaruma whether A.L. was susceptible to rebleeding due to previously weakened or damaged blood vessels. She responded as follows (4 R.R. 51):

> She had bleeding. The blood vessels aren't damaged to the degree that they're going to be more susceptible to injury the second time

> around according to any data that we currently have. So the bleeding is not going to be easier the second time around. Because she did not have any signs of weakened blood vessels that we call neomembranes that would have been predisposed to leaking more easily.

83. The radiologist's report in the TCH records reflects that, when Al. was examined in the emergency room on March 25, 2014, the CT scan revealed a "small amount of extra-axial hemorrhage in high L frontal region (SAH), [a] tiny amount of blood along falx to L of midline, [and] subtle R frontal scalp swelling" (AX2). There was no reference to a "great deal" of blood. Dr. Donaruma did not mention this.

84. Dr. Schaffer testified at the habeas hearing that Dr. Donaruma's testimony that there was a great deal of blood on the brain was contradicted by the radiologist's report that there was only a small amount of blood (1 H.R.R. 122-23).

85. Dr. Powell testified at the habeas hearing that 98 to 99 percent of A.L.'s subdural hematomas were old, and there was only a small amount of new blood (1 H.R.R. 163). Subdural hematomas are not necessarily the result of abuse; they can occur spontaneously and for no reason; and, infants can be born with them (1 H.R.R. 164). Dr. Donaruma's testimony was misleading to the extent that she did not quantify the percentages of the old and the new blood and she suggested that the new blood was the result of recent acute trauma (1 H.R.R. 65-67).

86. Tunnell testified at the habeas hearing that he did not research whether the new blood could be re-bleeding from a previous injury, and he was not aware of the medical literature that a child with pre-existing chronic subdural hematomas is susceptible to rebleeding, even if she is handled normally (1 H.R.R. 66-67).

87. Tunnell performed deficiently by failing to impeach Dr. Donaruma's misleading testimony that a CT scan revealed a "great deal" of blood inside A.L.'s head with the TCH records reflecting that there was a large amount of old blood but only a small amount of new blood and by failing to call a radiologist to explain this.

88. No reasonable strategy could justify these omissions.

Failure to present expert testimony that the complainant did not sustain a traumatic brain injury as a result of being shaken.

89. Dr. Donaruma testified that A.L. had a "great deal" of blood inside her head, including old collections over the surface on both sides of her brain and a small amount around her cerebellum; that she had seizures within 48 hours of her arrival at the hospital; that traumatic force made her brain malfunction; that the back of her head was not swollen; that she probably sustained an acceleration/deceleration injury without impact; and, that someone could have held her around

the chest and shook her, but her brain kept moving (4 R.R. 27-28, 34-36).

90. Tunnell did not challenge Dr. Donaruma's diagnosis of Shaken Baby Syndrome (SBS) (now referred to as Abusive Head Trauma or AHT).

91. Drs. Schaffer and Powell testified at the habeas hearing that the classic presentation of SBS is a clinical triad of (1) subdural hematomas, (2) retinal hemorrhages, and (3) brain damage (I H.R.R. 118-20, 167-68). A.L. did not present to TCH with retinal hemorrhages, and her CT and MRI scans did not reveal edema or any other sign of brain parenchyma injury. The scans demonstrated only the small acute and larger chronic subdural hematomas. The TCH radiologist made the same observations in his report (1 H.R.R. 168-69).

92. Tunnell testified at the habeas hearing that he knew at the time of trial that retinal hemorrhages and brain swelling are components of a SBS diagnosis. He could not explain why he did not question Dr. Donaruma's diagnosis in light of the medical records reflecting that these symptoms were absent. He acknowledged that he should have done so (1 H.R.R. 72-74).

93. Tunnell performed deficiently by failing to call a pediatrician and/or radiologist to impeach Dr. Donaruma's testimony that A.L.'s brain was injured as a result of her being shaken.

94. No reasonable strategy could justify this omission.

Failure to present expert testimony that the complainant did not sustain a traumatic brain injury after applicant gave her a bottle.

95. Dr. Donaruma testified at trial that Lewis' account that he fed A.L., she shrieked, he tried to burp her, and she went limp was not plausible. If A.L. had sustained a traumatic brain injury, she would not have been able to take a bottle; thus, she sustained the brain injury and had a seizure after she took the bottle, when Lewis was the only person with her (4 R.R. 41-43).

96. Dr. Alexander testified at trial that he agreed with Dr. Donaruma's opinion (4 R.R. 134, 138-39).

97. Dr. Schaffer testified at the habeas hearing that A.L.'s seizure on March 25 could have been caused by an event that occurred long before that date, including in utero; that the seizure could not be tied to any specific event; that the TCH medical records do not indicate that A.L. had a traumatic brain injury on March 25; and, that the Memorial Hospital medical records reflecting that A.L. had normal sucking and feeding at 9:50 a.m. and took a bottle at 12:30 p.m. disproved Dr. Donaruma's and Dr. Alexander's opinions that Lewis inflicted a traumatic brain injury on A.L. after he gave her a bottle on March 25 (1 H.R.R. 121-22, 124, 167; AX 6 at Exhibits 2 and 3).

98. Dr. Powell testified at the habeas hearing that he agreed with Dr. Schaffer's opinion and further explained that, when a child sustains a severe head injury, she loses the muscle coordination necessary to

feed and swallow for weeks, if not months (1 H.R.R. 170, 197). Drs. Donaruma and Alexander should have noticed in the medical records that A.L. was feeding normally shortly after being taken to the hospital and should not have testified that Lewis inflicted a traumatic brain injury on her after he gave her a bottle (1 H.R.R. 170-72).

99. Dr. Powell believes that A.L. probably had a seizure instead of abusive head trauma (1 H.R.R. 173, 202-03).

100. Tunnell testified at the habeas hearing that he assumed that a jury would believe that A.L. had sustained a traumatic brain injury on March 25, 2014, and, as a result, he did not conduct any medical research or hire a doctor—decisions he now regrets (1 H.R.R. 48-49, 51, 53, 55). He agreed that he should have impeached Drs. Donaruma and Alexander with the medical records that A.L. had normal feeding and sucking and took a bottle without distress after she arrived at the hospital that morning (1 H.R.R. 74-78).

101. Tunnell performed deficiently by failing to call a pediatrician and/or a radiologist to impeach Drs. Donaruma's and Alexander's testimony that A.L. sustained a traumatic brain injury as a result of Lewis shaking her after she took a bottle at 8:30 a.m. on March 25.

102. No reasonable strategy could have justified this omission.

Failure to present expert testimony that the complainant's lack of bilateral olfactory bulbs made her susceptible to seizures.

103. Dr. Donaruma testified at trial that A.L. had seizures within 48 hours of arriving at TCH as a result of a brain injury (4 R.R. 28).

104. Tunnell did not call an expert to provide an alternative explanation for the seizures.

105. Dr. Powell testified at the habeas hearing that the medical records reflect that A.L. has a congenital absence of her olfactory bulbs; that one-third of babies born without olfactory bulbs have a seizure disorder; that A.L. was more susceptible to seizures than most of the population; and, that the absence of olfactory bulbs could explain her seizures in January and March of 2014 (1 H.R.R. 74-75).

106. Tunnell testified at the habeas hearing that he did not notice that the medical records reflect that A.L. has no olfactory bulbs, did not know that a child without olfactory bulbs is susceptible to seizures, and did not conduct any medical research on the issue (1 H.R.R. 78-79).

107. Tunnell performed deficiently by failing to present expert testimony that A.L.'s lack of olfactory bulbs made her susceptible to seizures.

108. No reasonable strategy could justify this omission.

C. Prejudice

109. The State relied on Drs. Donaruma's and Alexander's opinions that A.L. sustained a traumatic brain injury after Lewis, the only person present, gave her a bottle, as a child cannot swallow after sustaining a traumatic brain injury.

110. The key issue at trial was whether A.L. had a seizure as a result of a traumatic brain injury inflicted after she took a bottle on March 25, a preexisting brain injury, or an unrelated reason.

111. A competent defense lawyer cannot defend a case that depends on the medical evidence without the assistance of a competent medical expert.

112. The jury heard only the State's theory, as presented by Drs. Donaruma and Alexander.

113. Tunnell did not present any controverting expert testimony or impeach Drs. Donaruma and Alexander.

114. As a result of Tunnell's deficient performance, the jury did not know the following (established by the testimony of Drs. Schaffer and Powell):

- that, if A.L. was the victim of previous abusive head trauma, it was inflicted by Amber rather than Lewis,
- that A.L.'s fractures could have occurred during or shortly after birth and cannot be linked to any conduct by Lewis;

- that A.L.'s highly elevated liver enzymes were caused by a viral infection that resulted from a fever rather than from blunt force trauma;
- that A.L. was susceptible to rebleeding in her brain due to preexisting subdural hematomas, and there was only a small amount of new blood in her head instead of a "great deal" of blood;
- that Dr. Donaruma diagnosed SBS without considering that A.L. did not present with retinal hemorrhages and a brain injury;
- that Drs. Donaruma and Alexander concluded that Lewis inflicted a traumatic brain injury on A.L. after she took a bottle at 8:30 a.m. on March 25, 2014, without considering that she had normal feeding and sucking at the hospital at 9:50 a.m. and took a bottle at 12:30 p.m. (which she could not have done if she had sustained a traumatic brain injury); and
- that Dr. Donaruma did not consider that A.L.'s lack of bilateral olfactory bulbs could have caused her seizures.

115. If Tunnell had consulted with a competent pediatrician and radiologist, he could have presented persuasive expert testimony that A.L.'s seizure on March 25, 2014, was not the result of recently inflicted head trauma or, if it was, that Amber inflicted it.

116. The State did not call Drs. Donaruma or Alexander at the habeas hearing to defend their trial testimony or attempt to explain why Drs. Schaffer and Powell are wrong about any of the above matters.

117. But for Tunnell's errors, there is a reasonable probability that the jury would have acquitted Lewis of intentionally causing the head injury or been unable to reach a verdict.

118. Lewis's conviction for intentionally causing serious bodily injury is not worthy of confidence.

119. Tunnell's errors did not adversely affect Lewis's convictions for recklessly causing the fractures.

III.

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT STAGE

A. The Standard Of Review

120. The Strickland standard applies to the determination of ineffective assistance of counsel as it impacts the punishment assessed. Hernandez v. State, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). Lewis must show that his sentences are not worthy of confidence. Cf. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

B. Deficient Performance

Failure to impeach Dr. Donaruma's testimony that the complainant probably will have brain damage with her sworn statement in the hospital records that the complainant's prognosis is good with continued medical management.

121. The prosecutor asked Dr. Donaruma at trial, "What is the prognosis for [A.L.]?" (4 R.R. 41). She responded that, " . . . in children who survive abusive head trauma, about two-thirds of them have obvious symptoms." Some are "devastated," and have "cerebral palsy, blindness, seizure disorder, clinical developmental arrest, and . . . never achieve the potential of their same-age peers" (4 R.R. 41-42). Others have "less overt signs" and "don't look different from their same-age peers, but . . . have a lot of cognitive and behavioral problems," such as "oppositional defiant disorder, conduct disorder, attention deficient disorder and other learning disabilities that affect them . . . through their early life" (4 R.R. 42). She concluded that A.L. "likely has some type of brain injury that we may not fully understand until she gets older," as "her cognitive and behavioral problems may not have shown themselves because she has to grow into them" (4 R.R. 42). However, she is "worried about [A.L.'s] cognitive and behavioral future based on her injuries" (4 R.R. 60).

122. The prosecutor argued during his closing argument at the guilt-innocence stage, "A third of these cases die, a third of them are severely disabled and a third of them have impairment. So when you

really consider everything that happened to [A.L.] it is sort of miraculous that she is alive" (5 R.R. 189). He argued during his closing argument at the punishment stage, "How would you feel if you saw that somebody had almost took the life of a child, a child who will always have problems, who has a brain injury that we don't even know yet how it will be manifest . . . ?" (7 R.R. 36).

123. The jury assessed the maximum punishment on each count-20 years and a $10,000 fine for the leg fracture and the clavicle fracture, and 99 years and a $10,000 fine for the alleged brain injury.

124. Dr. Schaffer testified at the habeas hearing that Dr. Donaruma wrote in A.L.'s discharge summary that her prognosis was "good with timely medical management." Nothing in the medical records indicates that A.L. suffered a traumatic brain injury on March 25, 2014, or that she will always have problems (1 H.R.R. 123-24).

125. Tunnell testified at the habeas hearing that he probably did not look at Dr. Donaruma's prognosis and that he should have impeached her with it (1 H.R.R. 82-84).

126. Tunnell did not perform deficiently by failing to impeach Dr. Donaruma's testimony about A.L.'s grim prognosis with the Physician's Statement that she signed when A.L. was discharged from hospital. Additionally, the prosecutor's closing argument was proper.

127. Lewis is not entitled to a new trial on punishment.

IV.

INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

128. An appellant has a right to the effective assistance of counsel on appeal. U.S. CONST. amends. VI and XIV; Evitts v. Lucey, 469 U.S. 387, 396 (1985).

129. Strickland applies in the appellate context. Smith v. Robbins, 528 U.S. 259, 285 (2000).

130. Appellate counsel has a duty to raise any issue that would require relief. When appellate counsel failed to raise a viable issue, a habeas applicant is entitled to an out-of-time appeal if reasonably competent counsel would have raised the issue and there is a reasonable probability that an appellate court would have granted relief. See Ex parte Daigle, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993) (appellate counsel ineffective in failing to raise denial of jury shuffle); Ex parte Miller, 330 S.W.3d 610, 624-25 (Tex. Crim. App. 2009) (appellate counsel ineffective in failing to raise that evidence was insufficient to prove prior conviction alleged for enhancement of punishment).

B. Deficient Performance

Failure to raise the issues that the evidence was legally insufficient to sustain the convictions.

131. Count One of the indictment alleged that Lewis intentionally and knowingly caused serious bodily injury to A.L. by striking her with an unknown object, applying pressure to her chest area, dropping her, or jerking or twisting her leg on or about January 28, 2014 (the leg fractures). Count Three alleged that Lewis intentionally and knowingly caused serious bodily injury by striking A.L. with an unknown object or applying pressure to her clavicle area on or about March 10, 2014 (the collarbone fracture) (1 C.R. 23-24).

132. The State presented no direct evidence that Lewis engaged in any of this conduct or caused these injuries. Indeed, the Minkners and Amber testified that they did not suspect that Lewis hurt A.L., and they did not know what happened to her (3 R.R. 213, 229; 4 R.R. 80, 82, 238-39; 5 R.R. 80-81).

133. Appellate counsel did not perform deficiently by failing to raise that the evidence was legally insufficient to establish that Lewis caused these specific injuries to A.L., as the court of appeals probably would not have reversed the convictions based on legally insufficient evidence.

134. Count Five of the indictment alleged that Lewis intentionally and knowingly caused serious bodily injury to A.L. by striking her with an unknown

object or dropping her on or about March 25, 2014 (the traumatic brain injury) (1 C.R. 24).

135. The State presented no evidence that Lewis struck or dropped A.L. on or about that date or that she was injured in that manner.

136. Dr. Donaruma testified that Lewis inflicted a traumatic brain injury on A.L. on that date by shaking her (4 R.R. 34, 40).

137. Appellate counsel did not perform deficiently by failing to raise that there was a material variance between the indictment allegation that Lewis inflicted the head injury by striking A.L. with an unknown object or by dropping her and the evidence that he caused the injury by shaking her, as the court of appeals probably would not have reversed the conviction based on legally insufficient evidence.

IN THE 217TH DISTRICT COURT
OF ANGELINA COUNTY, TEXAS

EX PARTE	§	
	§	CAUSE NO. 2016-0335-A
ANDREW LEWIS	§	

RECOMMENDATION AND ORDER

The court recommends a new trial on the conviction for intentionally causing serious bodily injury to A.L. on March 25, 2014, but not on the convictions for recklessly causing serious bodily injury to A.L. on

January 28 and March 10, 2014. The court does not recommend a new trial on punishment or a new appeal on those counts.

The District Clerk is ordered to prepare a transcript of all papers in this cause and send it to the Court of Criminal Appeals as provided by article 11.07 of the Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

a. the indictment and judgment;

b. the application for a writ of habeas corpus;

c. the brief;

d. the exhibits;

e. the motions;

f. the State's answer;

g. all other documents filed by the applicant;

h. the appellate record in cause number 2016-0335;

i. the reporter's record from the evidentiary hearing;

j. the applicant's proposed findings of fact and conclusions of law;

k. the Court's findings of fact and conclusions of law; and

l. any objections filed by either party to the Court's findings of fact and conclusions of law.

The District Clerk shall send a copy of this order to applicant, his counsel, and counsel for the State.

SIGNED and ENTERED on Signed: 12/12/2022 01:36 PM, 2022.

/s/ Robert K. Inselmann
Robert K. Inselmann
Judge Presiding

NO. 12-16-00319-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ANDREW LEWIS, APPELLANT	***§***	***APPEAL FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Andrew Lewis appeals his conviction for injury to a child. In one issue, he challenges the admission of certain evidence during trial. We affirm.

BACKGROUND

The State charged Appellant with six counts of injury to a child, A.L. Before trial, the State dismissed Count VI. Five counts proceeded to trial and Appellant pleaded "not guilty" to all five counts.

Appellant and Amber Lewis are the parents of A.L., who was born in January 2014. After A.L.'s birth, Appellant became A.L.'s primary caregiver when Amber returned to work. On March 25, 2014, A.L. was admitted to the hospital for multiple injuries. According to Appellant, he prepared a bottle for A.L. in the morning and noticed that it was "very odd how she was

feeding." Because she was fussy, Appellant thought she needed a diaper change. When he placed her on the changing table, she appeared startled and he noticed some twitching. He picked her up and noticed her arm violently shaking and her eyes rolling to the back of her head. He panicked and went to Craig Minkner, his father-in-law, who instructed him to call 9-1-1. Craig described A.L. as "very limp and then she shook." He testified that she "felt dead." He described Appellant as upset, afraid, and nervous. Appellant testified that, at some point, A.L. became very stiff, let out a shrill cry, and spit up. When Ivan Tapia with the Lufkin Fire Department responded to the scene, he noticed that all of her movements tracked to the left side, which he explained indicates a brain injury. He observed that Appellant was not as concerned as a father should be.

According to Dr. Marciella Donaruma, A.L. suffered from multiple bruises, bleeding inside her head, biochemical liver trauma, and broken bones in her chest, hand, and leg. Some of her injuries were old enough to have begun the healing process and she had both fresh and old collections of blood overlying the surface of her brain. Dr. Donaruma explained that, based on Appellant's account of having fed A.L. before she began seizing, A.L. would not have been able to eat if she had the brain injury at the time of feeding; thus, it was logical to believe that the injury occurred after the feeding. Dr. Randell Alexander testified that a child with a brain injury would suffer from an impaired ability to swallow.

Witnesses testified that A.L.'s previous wellness checkups never reflected any abnormalities. In the days before March 25, Appellant, Amber, and others noticed slight bruising on A.L.'s facial area. The parents planned to take her to the doctor on March 24, but the appointment never happened. When Patrick Brice with Child Protective Services asked Appellant about A.L.'s subdural hematoma, and fractured femur, clavicle, and ribs, Appellant appeared shocked. He described Appellant as calm, cooperative, and forthcoming. Appellant's mother, sister, and sister-in-law testified that Appellant was a loving father, interacted with A.L., and was proud of A.L. Amber, Craig, and Michelle Minkner, Appellant's mother-in-law, testified that they never saw Appellant harm A.L. Appellant denied causing A.L.'s injuries.

Nicole Yarbrough, an investigator for CPS, testified that Appellant thought perhaps Michelle hurt A.L. Appellant's sister likewise testified that Amber blamed Michelle, not Appellant. Appellant's mother observed an argument between Amber and Michelle, during which Amber asked Michelle, "Well, you had her for the last two weeks, what did you do to her?" Appellant's sister and mother also testified that they had seen Amber being aggressive and "rough" with A.L.

Craig testified that A.L. did not have the same bond with Appellant as she did with Amber and Michelle. Bailey Legg, Amber's best friend, testified that A.L. preferred Amber. Samantha Skinner, a foster case supervisor for CPS, testified that she observed a recorded visitation between. A.L. and her parents,

during which A.L. was comfortable with Amber, but would "stiffen up and become very rigid[]" when handed to Appellant. Yarbrough also observed A.L. cry and tense up when given to Appellant. Skinner believed something was not right with A.L.'s behavior when with Appellant, who had been her primary caregiver.

Dr. Donaruma testified that A.L. had two metaphyseal fractures, which are "highly specific for child abuse[]" and that the liver injury, usually caused by blunt force trauma, is life-threatening. She explained that "violent and forceful" whiplash action typically causes the type of bleeding in the head that A.L. experienced. Dr. Alexander testified that it takes a lot of force to cause a metaphyseal fracture and rib fractures in a child. He testified that the symptoms of a traumatic brain injury occur immediately and may escalate over time, and that seizures can occur anytime after the injury. Dr. Donaruma agreed that although signs of abusive head trauma are almost immediate, it could be several days before seizures begin. Dr. Alexander explained that Appellant's account of what occurred on March 25 was a "description of a new brain injury that corresponds to the new blood" inside A.L.'s head. He further explained that the "shrill cry" Appellant described hearing from A.L. is an indication of a neurologic or brain injury. Dr. Alexander agreed that Appellant's account indicated that he was alone with A.L. when the injury occurred and she became symptomatic. Dr. Donaruma determined that A.L. had been physically abused on more than one occasion. She opined that when a child suffers from such injuries, she

would conclude that the only person with the child is the one who caused the injuries, in this case Appellant.

After the State rested its case, it abandoned two of the remaining five counts. At the conclusion of trial, regarding counts one and two, the jury found Appellant "guilty" of the lesser included offense of reckless injury to a child. As for count three, the jury found Appellant "guilty" of intentional injury to a child. The jury assessed punishment at imprisonment for twenty years on counts one and two, and imprisonment for ninety-nine years on count three. The sentences were ordered to run concurrently. This appeal followed.

ADMISSION OF EVIDENCE

In his only issue, Appellant contends that the trial court abused its discretion by admitting evidence that he voluntarily relinquished his parental rights for the purpose of showing that he had a "guilty mind."

Standard of Review

We review a trial court's evidentiary rulings for abuse of discretion. ***Oprean v. State***, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). We must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. ***Willover v. State***, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). We will not reverse unless the trial court's ruling falls outside the "zone of reasonable disagreement." ***Oprean***, 201 S.W.3d at 726. "Exclusion of

evidence does not result in reversible error unless the exclusion affects a substantial right of the defendant." ***Smith v. State***, 355 S.W.3d 138, 151 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *see* TEX. R. APP. P. 44.2(b).

Facts

At trial, the State sought to admit evidence that Appellant voluntarily relinquished his parental rights to A.L. Defense counsel objected under Rule 408 and explained that Appellant voluntarily relinquished his rights in order to settle the CPS case against him. Counsel later objected and requested a running objection for the following reasons:

> First, we object on the basis of improper character evidence under Rule 404(a), tending to show a trait of bad character to which they are acting consistent with as far as the charge that has been – the crime that has been charged against them. As such, we believe it would be inadmissible for that purpose. We also object on the basis of Rule 408, which makes inadmissible, for most purposes, discussion of evidence of compromise or settlement of compromises. And this morning I think we had a stipulation, and correct me if I'm wrong, but the voluntary relinquishment was done in connection with the settlement of an ongoing civil litigation by CPS involving my client. . . . Finally, we would object under Rule 403, that whatever limited probative value this evidence may have of assistance to

> the jury to show guilty knowledge or whatever was the State's position on that, it is substantially outweighed by both the prejudice that it's likely to engender and the likelihood that this evidence will be used by the jury for an improper purpose, that is as character evidence. And the fact that it would also confuse them as to the issues that are involved. For that reason, we would object to that and ask for a naming objection on all bases.
>
> . . . .
>
> I object under all Rule 404, 404(a) and 404(b), and under Rule 408. 408 does say there's some limited purposes for which compromise evidence can be introduced. It is my position that none of those apply, but if they did, it would be substantially – the prejudicial value would be substantially outweighed.

The State argued that the evidence was admissible as a statement against interest and shows knowledge of guilt. The State likened the evidence to the admissibility of evidence regarding flight. Defense counsel responded as follows:

> I understand what [the State] is saying about a limited purpose to show guilty knowledge. I don't agree with him, but I understand that's a limited purpose, but to admit it as an admission against interest to show basically it's a bad act, that makes them bad people and they, therefore, committed a bad crime, that is not admissible. That is character evidence. It's not admissible for that purpose.

The trial court determined that evidence regarding Appellant's affidavit of relinquishment was admissible, but granted the defense's request for a running objection. When the affidavit was admitted into evidence, the trial court instructed the jury that the evidence is admitted for the limited purpose of showing Appellant's "intent, knowledge, motive or plan, if it does, and for no other purpose."

Skinner and Yarbrough testified that both Appellant and Amber filed affidavits voluntarily relinquishing their parental rights to A.L. Yarbrough denied telling the parents that they could avoid criminal prosecution by relinquishing their rights. Janae Wojasinski, a licensed professional counselor, testified Appellant and Amber told her that their attorneys advised them to relinquish their rights. During her testimony, Amber admitted voluntarily relinquishing her parental rights. She explained her impression from the attorneys that there would no longer be a criminal case and they might be able to see A.L. in the future if they relinquished their rights. Defense counsel asked Appellant about voluntarily relinquishing his rights. He testified to following his attorney's advice when relinquishing because he was told that he might still have a relationship with A.L. if he voluntarily relinquished as opposed to being terminated.

During closing, the State briefly mentioned the relinquishment:

> . . . The CPS ladies were concerned with protecting the child, with handling a civil case.

> They are not police officers. They have got a tape that runs, but they don't keep it ever unless they know that there's a reason to. And why would they think they would need to because these two defendants executed a voluntary relinquishment of their parental rights? They bailed out, so that case is over.
>
> . . .
>
> And here is the big thing. They executed a voluntary relinquishment of parental rights. It's in evidence. You can take it, hold it in your hand and look at it.
>
> . . .
>
> Somebody might get my watch. I would give it up. I would give up my deer rifle. I would give up my car. I wouldn't want to, if I had to, I could give my house up, but I will not give my child up and be left alive.

Analysis

On appeal, Appellant maintains that the trial court abused its discretion by admitting evidence that he voluntarily relinquished his parental rights to A.L. According to Appellant, the evidence of a different abuser was overwhelming, he denied harming A.L., he made no incriminating statements, and no one ever saw him abuse A.L. He contends that relinquishment does not demonstrate consciousness of guilt and is irrelevant absent evidence connecting the relinquishment to the elements of a criminal offense. He further

contends that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Appellant also argues that admission of the evidence violated Texas Rule of Evidence 408, which limits the admissibility of compromise offers and negotiations. According to Appellant, the alleged error affected his substantial rights.

The erroneous admission of evidence does not affect substantial rights if, after examining the record as a whole, the appellate court has fair assurance that the error did not influence the jury, or had but slight effect. ***Motilla v. State***, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). When making this determination, we "consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, [and] the character of the alleged error and how it might be considered in connection with other evidence in the case." ***Id.*** We may also consider the jury instructions, the State's theory, any defensive theories, closing arguments, voir dire if applicable, and whether the State emphasized the error. ***Id.*** at 355-56. Evidence of the defendant's guilt must also be considered when conducting a thorough harm analysis. ***Id.*** at 358.

Assuming, without deciding, that the trial court abused its discretion by admitting the complained-of evidence, the record does not demonstrate that any such error affected Appellant's substantial rights. Out of three days of testimony and numerous witnesses, evidence of the relinquishment constituted a small portion of the evidence presented to the jury. The State

briefly mentioned, but did not overemphasize or dwell on, the relinquishment during closing argument. *See* ***id.*** at 355-56. Additionally, the jury previously heard Appellant's explanation that guilt did not motivate his relinquishment. Rather, his testimony indicates that he relinquished his rights out of fear that he would never see A.L. again and that voluntary relinquishment was essentially a way to avoid involuntary termination so that he might still have a relationship with A.L. in the future. Appellant further testified that he wished he had never signed the relinquishment.

Moreover, independent of Appellant's voluntary relinquishment, the jury heard evidence from which it could reasonably conclude that Appellant caused A.L.'s injuries. *See* ***id.*** at 358. The record demonstrates that (1) Appellant was A.L.'s primary caregiver and the person present when she became symptomatic, (2) symptoms of a traumatic brain injury occur immediately, (3) A.L.'s shrill cry on March 25 indicated a neurologic or brain injury, (4) a child struggles to swallow after a brain injury, but Appellant testified to being able to feed A.L. before she began seizing, (5) A.L. suffered from fractures and bleeding inside the head that could only be caused by a significant amount of force, and (6) A.L. exhibited odd behavior when handled by Appellant. A.L.'s tearful and tense behavior when being held by Appellant could lead the jury to reasonably conclude that her behavior was a product of fear resulting from abuse committed by Appellant. Also, the jury observed Appellant at trial and was in the best position to judge his credibility and determine whether

he would be capable of causing the force necessary to create A.L.'s injuries. *See* ***Lancon v. State***, 253 S.W.3d 699, 705-06 (Tex. Crim. App. 2008) (jury is in best position to judge witness's credibility and demeanor because it is present to hear the testimony). As sole judge of the weight and credibility of the evidence, the jury was entitled to accept evidence of Appellant's guilt and reject Appellant's contention that he did not cause A.L.'s injuries. *See* ***id.*** at 707; *see also* ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) ("[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt[]").

We also note that, in its charge, the trial court including the following instructions:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant.
>
> . . .
>
> The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and, if it fails to do

> so, you must acquit the defendant. It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.
>
> . . .
>
> You are exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony[.]

We presume the jury followed these instructions when determining whether the State proved Appellant's guilt beyond a reasonable doubt. *See* ***Resendiz v. State***, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003). In fact, despite hearing evidence of the relinquishment, the jury found Appellant "not guilty" of intentional or knowing injury to a child and "guilty" of reckless injury to a child on two of the three counts. *See* ***Casey v. State***, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007) (holding erroneous admission of photographs harmless, noting that jury convicted appellant of lesser-included offense rather than charged offense). This suggests that the jury adhered to the trial court's instructions and was not unduly influenced by evidence of Appellant's voluntary relinquishment of his parental rights.

Accordingly, based on our review of the record as a whole, we have fair assurance that any error stemming from the admission into evidence of Appellant's voluntary relinquishment of his parental rights did not influence the jury, or had but slight effect. *See* ***Motilla***, 78 S.W.3d at 355. Because this admission did not

violate Appellant's substantial rights, we overrule his only issue. *See* ***id.***; *see also* ***Smith***, 355 S.W.3d at 151; TEX. R. APP. P. 44.2(b).

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered September 6, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

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LEWIS, ANDREW **WR-94,433-01**
Tr. Ct. No. 2016-0335-A

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

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