In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00250-CR

BRYAN KEITH LYNCH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Lamar County, Texas
Trial Court No. 28257

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

A Lamar County jury convicted Bryan Keith Lynch on one count of indecency with a child by contact and one count of aggravated sexual assault of a child. In accordance with the jury's recommendation, the trial court sentenced Lynch to twenty years in prison on the indecency charge and life in prison on the aggravated sexual assault charge.

On appeal, Lynch contends that the trial court erred by failing to order a second competency evaluation after Lynch's suicide attempt, by denying Lynch's request for funds to hire an expert witness, and by admitting evidence of Lynch's suicide attempt over his Rule 403 objection.

We affirm the trial court's judgment because (1) Lynch failed to show a material change in his mental status, (2) Lynch failed to preserve his request for funds to retain an expert, and (3) admitting evidence of Lynch's suicide attempt was discretionary.

Jenny is the mother of S.F. and B.F.[1] Jenny and her children lived in Roxton, Texas, with her boyfriend, Lynch. After living in Roxton for about three years, Jenny married Lynch in 2013.

In October 2017, Jenny, Lynch, and her children moved to Mesquite, Texas, where they lived with Jenny's parents. Several weeks later, Jenny's parents threw Lynch out of the house for being disrespectful. Jenny and Lynch divorced soon afterward.

Jenny testified that, during her time living with Lynch, Jenny found Lynch's behavior in general, and in particular with regards to S.F., to be concerning. While they lived in Roxton, Lynch would "sit on the couch naked with a blanket over him all day" and ignored Jenny's requests that he clothe himself with the children around. When Jenny would run errands or go shopping, Lynch

[1]To guard the child victim's privacy, we refer to her as S.F., her brother as B.F., and her mother as Jenny. *See* TEX. R. APP. P. 9.10(a)(3); *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

rarely allowed S.F. to go with her. Jenny testified that Lynch was "always wanting to be around [S.F.], putting his arms around her, and being so lovey-dovey with her."

In January 2018, after Lynch had left their lives, Jenny asked a then thirteen-year old S.F., "Did [Lynch] touch you in any way that was inappropriate, did he touch your privates, did he touch you, did he make you do something to him?" Jenny testified that "[S.F.] immediately cried and said yes, Mommy, he made me get naked multiple times and he put his private into mine and, when I asked him to stop, he put his hand over my mouth, told me to shut up . . . [and said] if I told anybody that he would kill you and [B.F.]." S.F. testified that Lynch threatened to kill Jenny and B.F. if she ever told anyone about the abuse. She believed his threats because "he had a gun and a knife, and he carried it at all times."

In a two-count indictment, Lynch was charged with indecency with a child by contact, a second-degree felony, and aggravated sexual assault of a child, a first-degree felony. He waived arraignment and entered a plea of not guilty. On September 9, 2019, Lynch filed a pro se "motion of incompetency," and the trial court ordered that Dr. David Bell examine Lynch and determine, in pertinent part, whether Lynch was "competent or incompetent to stand trial." After examining Lynch at the Lamar County Jail, Bell filed a competency evaluation with the trial court that stated, in pertinent part:

> [Lynch] was quiet and cooperative. His speech was logical, and goal directed. . . .
>
> . . . .
>
> . . . . He claimed since coming to jail that he hears voices that tell him to do things, and that was a result of something doctor's [sic] put in his ears. He describes these voices matter-of-factly. He said he told the jail doctor and was placed on two

> medications. One was Seroquel, an antipsychotic. He could not remember the other one. He said the medications don't do anything. . . .
>
> He does not have problems sleeping and eating. He said he "always" feels depressed.
>
> . . . .
>
> When questioned about his alleged offense, he said, "I don't know" and when pressed he said, "some sort of theft I think." . . . .
>
> Throughout the interview, he was calm and rational. He appeared mildly depressed but did not demonstrate any bizarre behavior. The sole symptom of his alleged mental illness is his claim that he hears voices. Again, he has never had any mental health issues before now, except for probably behavior problems in school . . . .
>
> . . . .
>
> He appeared to want to be sent to a mental health placement rather than go to trial.
>
> It is my opinion that he is malingering. His demeanor was calm, matter of fact, and he did not demonstrate any issue with emotions or behavior. . . .
>
> . . . .
>
> He is able to name his attorney as Nick Stallings. He remembers Judge Tidwell's name and he understands the adversarial system in criminal cases. He understands plea bargains and probation and seemed to be thinking it over when I asked him[,] hypothetically[,] if he would take a plea bargain and be on probation. His thinking was organized more than one would expect from a person with schizophrenia or other psychosis.

Bell found that Lynch was able to understand the charges against him; disclose pertinent facts, events, and states of mind to his counsel; discuss community supervision, parole and plea bargains; understand the adversarial nature of the proceedings; exhibit appropriate courtroom behavior; and testify, if needed. Based on the evaluation and his findings, he concluded that Lynch was "competent to stand trial." The trial court entered an order finding Lynch competent to stand trial.

On October 28, 2019, the day Lynch's trial was set to begin, Lynch attempted suicide by ingesting a handful of pills. Lynch was hospitalized for about three hours and, having recovered, returned to the custody of the Sheriff's office. Lynch's counsel filed a motion for a continuance and a motion for a competency evaluation. After a hearing, the trial court denied both of Lynch's motions, and the case proceeded to jury trial. The jury found Lynch guilty on both counts. Following the jury's recommendation, the trial court sentenced Lynch to twenty years in prison for the first count and life in prison for the second count.

(1) Lynch Failed to Show a Material Change in His Mental Status

Lynch contends that the trial court erred by denying his second motion for a competency evaluation.

We review for an abuse of discretion a trial court's decision to deny a request for a competency examination. *Bigby v. State*, 892 S.W.2d 864, 885 (Tex. Crim. App. 1994). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *See Howell v. State*, 175 S.W.3d 786, 792 (Tex. Crim. App. 2005).

A person is incompetent to stand trial if he or she does not have sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings. TEX. CODE CRIM. PROC. ANN. art. 46B.003(a)(1), (2). A defendant can be competent to stand trial even if highly medicated or suffering from a severe mental disease or defect. *See Ex parte LaHood*, 401 S.W.3d 45, 56 (Tex. Crim. App. 2013) (orig. proceeding). "Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent to stand trial." TEX. CODE CRIM. PROC. ANN. art.

46B.004(a). On a suggestion of incompetency, the court may appoint one or more disinterested experts to examine the defendant, to report to the court on the competency or incompetency of the defendant, and to testify on the issue at any trial or hearing involving that issue. TEX. CODE CRIM. PROC. ANN. art. 46B.021. During an examination, the expert shall consider, in addition to other issues determined relevant by the expert, the various factors set out in the statute. TEX. CODE CRIM. PROC. ANN. art. 46B.024. A defendant is presumed competent to stand trial unless proved incompetent by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art. 46B.003(b).

Unless there is a material change of circumstances suggesting that a defendant's mental state has deteriorated since the competency evaluation, the trial court is not required to revisit the issue. *Turner v. State*, 422 S.W.3d 676, 693 (Tex. Crim. App. 2013). Thus, "[t]o justify a second competency hearing, defense counsel must offer new evidence of a change in defendant's mental condition since the first competency hearing and evaluation." *Ashley v. State*, 404 S.W.3d 672, 678 (Tex. App.—El Paso 2013, no pet.) (citing *Learning v. State*, 227 S.W.3d 245, 250 (Tex. App.—San Antonio 2007, no pet.)).

The record reflects that Lynch was formally examined by Bell and found competent to stand trial. Thus, we will find an abuse of discretion in not ordering a second competency evaluation only if there was evidence suggesting that Lynch's mental status or mental condition had deteriorated after the initial competency evaluation. *See Turner*, 422 S.W.3d at 693; *Ashley*, 404 S.W.3d at 678.

Here, defense counsel filed a motion suggesting that Lynch's competency should be re-examined. In the affidavit in support of the motion, Lynch's counsel stated that,

> based on the behavior and conduct of Bryan Keith Lynch in the Lamar County Jail, and attempting to interview him in preparation for his upcoming trial, that he may be suffering from such mental condition that he is unable to intelligently discuss the facts concerning the case or the accusations against him.

At the hearing on Lynch's motions, the trial court took judicial notice of Lynch's previous pro se motion for a competency evaluation, the court's order requiring Bell to evaluate Lynch, and Bell's competency report that found that Lynch "was not only competent but was malingering." During the hearing, Lynch's counsel argued that Lynch should be re-evaluated because Lynch attempted suicide and reported hearing voices. The State relied on Bell's evaluation and the finding that Lynch was malingering and trying to avoid going to trial. Having taken into account "all of the other prior proceedings, [Lynch's] behaviors, his comments to the Court . . . , the filings of his own pro se motion," and Bell's evaluation, the trial court denied the motion, finding that Bell's evaluation had already been considered, and dismissed Lynch's claims of hearing voices and that Lynch's attempted suicide "was an attempt to avoid prosecution."

Here, Lynch argued that he was entitled to a second mental evaluation because he was hearing voices and had attempted suicide. However, hearing voices and depression were not new circumstances as they were cited during Bell's initial mental evaluation. *See Turner*, 422 S.W.3d at 693. "Although an attempted suicide is disturbing, it does not necessarily prove that a person lost the ability to meaningfully consult with his attorney or that he lacked a rational and factual understanding of the charged offense and trial proceedings." *LaHood*, 401 S.W.3d at 56. There was no evidence that Lynch did not understand the proceedings or that he was unable to consult with his attorney. Therefore, the trial court was within its discretion to find that Lynch's suicide attempt was merely an attempt to avoid trial. *See Ashley*, 404 S.W.3d at 679 (defendant found

competent despite "bizarre" behavior exhibited before trial). Accordingly, the trial court did not abuse its discretion in denying Lynch's motion, and we overrule this point of error.

(2) Lynch Failed to Preserve His Request for Funds to Retain an Expert

Lynch also contends that the trial court erred in denying his request for funds to retain an expert witness regarding the psychological effects of long-term incarceration.[2]

The State initially argues that Lynch failed to preserve this point of error for appellate review. We agree. A defendant must preserve a complaint that the trial court failed to grant a request for expert funds. *Ex parte Jimenez*, 364 S.W.3d 866, 881 (Tex. Crim. App. 2012) (orig. proceeding). In *Jimenez*, the Texas Court of Criminal Appeals held that it could not review a trial court's denial of an *Ake* motion, on either direct appeal or habeas review, if the defendant failed to file a "proper written *Ake* motion," because an *Ake* motion is a "record-based claim—dependent upon a written motion and formal ruling."[3] *Id.* at 881. Here, while Lynch made an oral ex parte motion to the trial court requesting $3,000.00 to $5,000.00 to retain an expert witness regarding the long-term effects of incarceration, he failed to file a formal, written motion with affidavits supporting his request. Therefore, Lynch failed to preserve this point of error for our review. *See id.* We overrule this contention.

[2]Requesting the appointment of, and payment for, an expert is commonly referred to as an *Ake* motion or an *Ake* claim. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

[3]"[A]n indigent defendant will not be entitled to funding for experts absent adequate factual support in the written motion that he presents to the trial judge." *Jimenez*, 364 S.W.3d at 881.

(3) Admitting Evidence of Lynch's Suicide Attempt Was Discretionary

Finally, Lynch argues that the trial court erred in admitting evidence of his suicide attempt because it was inadmissible under Rule 403, as its probative value was substantially outweighed by the danger of unfair prejudice.

Our analysis is guided by the following factors, known as the *Montgomery* factors: (1) how compellingly the extraneous-offense evidence serves to make a fact of consequence more or less probable; (2) the potential the other-offense evidence has to impress the jury "in some irrational but nevertheless indelible way"; (3) the time the proponent needed to use in developing the evidence (during which, the jury will be distracted from consideration of the indicted offense); and (4) the force of the proponent's need for this evidence to prove a fact of consequence (that is, whether the proponent has other probative evidence available to help establish this fact and whether this fact is related to an issue in dispute). *Montgomery v. State*, 810 S.W.2d 372, 389–90 (Tex. Crim. App. 1990) (op. on reh'g); *see Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002); *Hartsfield v. State*, 305 S.W.3d 859, 873 (Tex. App.—Texarkana 2010, pet. ref'd).

We review for an abuse of discretion a trial court's Rule 403 determination.[4] *Montgomery*, 810 S.W.2d at 391. In determining whether the trial court abused its discretion in making its Rule 403 determination, we must not only determine that the trial court did in fact conduct the required balancing test and did not simply rule arbitrarily or capriciously but must also measure the trial court's ruling against the relevant criteria by which a Rule 403 decision is to be made. *Id*. at 392.

[4]As noted by the Texas Court of Criminal Appeals, "Rule 403's use of the word 'may' reflects the draftsman's intent that the trial judge be given very substantial discretion in 'balancing' the probative value on the one hand and the unfair prejudice on the other, and that he should not be reversed simply because an appellate court believes that it would have decided the matter differently." *Powell v. State*, 189 S.W.3d 285, 288–89 (Tex. Crim. App. 2006).

Where this review leads to the conclusion that the danger of unfair prejudice substantially outweighs the probative value of the evidence, the court should find that the trial court erred in failing to exclude the evidence. *Id*.

Here, from the evidence that Lynch attempted suicide on the eve of trial, the jury could have reasonably inferred that Lynch had consciousness of guilt and was trying to avoid going to trial. *See Johnson v. State*, 208 S.W.3d 478, 500 (Tex. App.—Austin 2006, pet. ref'd); *Ross v. State*, 154 S.W.3d 804, 812 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). Therefore, this factor weighs in favor of admissibility.

Lynch argues that his suicide attempt impressed the jury in some irrational yet indelible way because, by arguing that the attempt was evidence that Lynch had a consciousness of guilt, the State "in effect treated Lynch's suicide attempt as a confession to the offenses alleged." However, as stated in our analysis of the first factor, evidence of the attempt can be probative of a consciousness of guilt and, therefore, does not suggest a decision on an improper basis. Therefore, the second factor weighs in favor of admission.

The State developed the evidence through the testimony of William Newman, a detention officer at the Lamar County Jail, and Chief Deputy Tommy Moore of the Lamar County Sheriff's office. Newman testified that, on the morning of August 28, 2019, while he was performing "observational rounds," Lynch stopped him, said, "[J]ust letting you know I'm not f***ing around," showed the officer "a handful of unidentified pills," and ingested them. Newman believed that, by doing so, Lynch was attempting suicide. A video recording of Lynch's actions was played for the jury. Moore testified that Lynch had been taken to Paris Regional Medical

Center and returned to the Lamar County Jail about six hours later, where he received a mental health evaluation. The two men's combined testimony constituted only thirteen pages of the reporter's record. Because the testimony and evidence did not consume an unusual or inordinate amount of time, this factor weighs in favor of admission.

The State presented sufficient evidence to convict Lynch even without evidence of his suicide attempt. S.F. testified that Lynch sexually abused her on at least two separate occasions and threatened to kill her family should she ever tell anyone about the abuse. Jenny testified regarding S.F.'s outcry and Lynch's strange, "lovey-dovey," and possessive behavior regarding S.F. However, the State did not present any physical evidence to support the allegations. Therefore, we find that the State's need for the evidence weighs neither for nor against admissibility. Having considered the *Montgomery* factors, we find that the trial court was within its discretion to admit the evidence of Lynch's suicide attempt. Accordingly, we overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: April 20, 2020
Date Decided: June 25, 2020

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