IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-20139

Summary Calendar

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JERRY WAYNE WIGFALL,

Petitioner-Appellant,

v.

WAYNE SCOTT, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-1351)

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(October 26, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Jerry Wayne Wigfall, proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus. Specifically, Wigfall raises two arguments in support of his petition: (1) there was insufficient evidence to support his conviction for aggravated robbery; and (2) his Sixth Amendment

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

rights were violated because his trial counsel was ineffective. We reject both arguments and affirm the judgment of the district court.

## I. PROCEDURAL POSTURE

On June 9, 1986, after conducting a bench trial, a Texas state trial judge found Wigfall guilty of aggravated robbery and sentenced him to 50 years in prison. See TEX. PENAL CODE ANN. § 29.03 (defining aggravated robbery). His conviction was affirmed by the Texas Court of Appeals for the Fourteenth District on April 2, 1987. On June 1, 1987, the Texas Court of Criminal Appeals refused Wigfall's petition for discretionary review on grounds that it was filed in an untimely manner.

Wigfall then filed three petitions for a writ of habeas corpus in the Texas courts, all of which were denied without written opinion. Ex Parte Wigfall, No. 10,870-02 (Tex. Crim. App. June 21, 1989); No. 10,870-03 (Tex. Crim. App. Feb. 28, 1990); and 10,870-04 (Tex. Crim. App. Feb. 3, 1993). Wigfall next sought a writ of habeas corpus from the federal district court, which denied his petition on the merits in an unpublished memorandum. Wigfall v. Collins, No. H-93-1351 (S.D. Tex. Jan. 13, 1994). On March 2, 1994, the district court granted Wigfall's request for a certificate of probable cause to appeal to this court.

## II. FACTUAL BACKGROUND

In the early evening hours of February 8, 1986, Sandra McMillan exited a Safeway grocery store with a friend and began walking to her car. Along the way, she was approached by Wigfall, who asked her if she had seen a woman with a baby. McMillan answered "no," and began to get into her car. As McMillan was preparing to close her door, Wigfall grabbed her arm and jerked her out of the car. Wigfall then threw McMillan against the car and punched her in the face, breaking her jaw.

Wigfall attempted to drive McMillan's car away, but could not figure out how to put the car in reverse. An off-duty police officer, Johnny McFarland, heard the commotion and approached the car. Wigfall exited the car and began running towards a grassy area. Shortly thereafter, Officer McFarland apprehended Wigfall and placed him under arrest.

## III. ANALYSIS

Wigfall raises two points of error on appeal. First, he claims that there was insufficient evidence to support his conviction for aggravated robbery. Second, he argues that his trial counsel was constitutionally ineffective. As a preliminary matter, we note that because Wigfall is proceeding pro se, we shall construe his arguments more liberally than we would if he was represented by counsel. Hughes v. Rowe, 449 U.S. 5, 9 (1980)

(per curiam); Securities and Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993).

*A. Sufficiency of the Evidence.*

In reviewing a habeas petitioner's claim of insufficient evidence, the reviewing court must ask whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the elements of the crime to have been proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 319 (1989); Callins v. Collins, 998 F.2d 269, 276 (5th Cir. 1993), cert. denied, 114 S. Ct. 1127 (1994). If a state appellate court has conducted a thoughtful review of the evidence, we give great deference to its determination as to sufficiency. Callins, 998 F.2d at 276; Porretto v. Stalder, 834 F.2d 461, 467 (5th Cir. 1987); Parker v. Procunier, 763 F.2d 665, 666 (5th Cir.), cert. denied, 474 U.S. 855 (1985).

Wigfall contends that no rational trier of fact could have found him guilty of aggravated robbery because the state failed to prove, beyond a reasonable doubt, that McMillan suffered "serious bodily injury" as required by the Texas aggravated robbery statute. TEX. PENAL CODE ANN. § 29.03. "Serious bodily injury" is defined in the Texas Penal Code as "bodily injury that creates a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE ANN. § 1.07(34) (current version at § 1.07(46)).

The testimony at trial as to the nature and extent of McMillan's injuries came primarily from McMillan herself.[1] She testified that after the incident, she was taken to the hospital emergency room, where she underwent surgery to wire her jaw shut. McMillan further testified that her jaw remained wired for four weeks, during which time she could not eat solid food or speak very well. Once the wires in her jaw were removed, McMillan spent an additional two weeks wearing removable "bands" to help heal her jaw, during which period she could only eat soft food.

There is no evidence in the record that McMillan's injury involved a "substantial risk of death" or "serious permanent disfigurement." Id. Thus, the only possible evidentiary basis to support Wigfall's conviction for aggravated robbery is that the injury inflicted upon McMillan caused a "protracted loss or impairment of the function[] of [a] bodily member or organ." Id. McMillan testified that she could not eat solid foods for six weeks nor speak normally for four weeks. This testimony undoubtedly indicates that McMillan suffered an "impairment of the function" of the jaw, a "bodily member." The question, therefore, is whether having one's jaw wired shut for four weeks, plus wearing a jaw "brace" for an additional two weeks

[1] There was also conclusory testimony by Officer McFarland, who stated that McMillan was "in pain" when he arrived on the scene and that he while he did not know that her jaw was broken, he "knew she sustained an injury to her mouth." In addition, Sergeant William Weaver testified that when he arrived on the scene, McMillan "was in a great deal of pain."

constitutes sufficiently "protracted" impairment to satisfy the Texas statutory definition of "serious bodily injury."

The Texas cases regarding protracted impairment, although certainly no model of clarity or consistency, indicate that McMillan's injury constitutes sufficiently "protracted" impairment. For example, in Brown v. State, 605 S.W.2d 572 (Tex. Crim App. 1980), the Texas Court of Criminal Appeals held that a broken nose constituted sufficient "serious bodily injury" to support an aggravated rape conviction because absent medical intervention, the injury would have caused permanent disfigurement and impairment of function. Id. at 575; see also Moore v. State, 802 S.W.2d 367, 369-70 (Tex. App.--Dallas 1990, pet. ref'd) (noting that the injury *as inflicted* is the determinative factor, without regard to subsequent medical intervention). In the present case, it was reasonable for the jury to infer that McMillan would have suffered permanent disfigurement and impairment of the function of her jaw had she not undergone surgery. Contrary to Wigfall's assertion, such an inference is within the common knowledge of most jurors; thus, expert medical testimony was not necessary for the state to carry its burden. See Carter v. State, 678 S.W.2d 155, 157 (Tex. App.--Beaumont 1984, no pet.) (noting that state does not have to use expert medical testimony to prove serious bodily injury "where the injury and its effects are obvious.").

Furthermore, in Pitts v. State, 742 S.W.2d 420 (Tex. App.--Dallas 1987, pet. ref'd), the Texas Court of Appeals concluded

that broken facial bones and a broken jaw that was wired shut for eight weeks was reasonably considered to be a "serious bodily injury" for purposes of aggravated assault. Id. at 421-22. Indeed, a broken finger which was still stiff three and one-half months after the victim was attacked has been held to be "protracted impairment" sufficient to support a conviction for aggravated assault. Allen v. State, 736 S.W.2d 225, 227 (Tex. App.-- Corpus Christi 1987, pet. ref'd).

The Texas Court of Appeals presumably considered these precedents in arriving at its determination that "the six-week loss of a jaw, wired shut, constitutes protracted impairment."[2] Wigfall v. State, No. B14-86-443-CR (Tex. Ct. App. April 2, 1987). Respecting the state court's superior knowledge of its own laws, we owe the determination by the Texas Court of Appeals on this matter great deference. Callins, 998 F.2d at 276; Porretto, 834 F.2d at 467; Parker, 763 F.2d at 666. Granting such deference and viewing the evidence in the light most favorable to the verdict, we conclude that there was sufficient evidence from which a rational jury could find, beyond a reasonable doubt, that McMillan suffered protracted impairment of her jaw. Hence, Wigfall's conviction for aggravated robbery must stand.

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[2] While the Texas Court of Appeals stated that McMillan's jaw was wired shut for six weeks, the record reveals that the jaw actually was wired shut for four weeks, followed by a two week period in which McMillan had to wear removable braces. This discrepancy, however, does not alter our conclusion.

*B. Ineffective Assistance of Counsel.*

Wigfall contends that his Sixth Amendment right to the effective assistance of counsel was violated because his trial counsel: (1) failed adequately to argue to the jury that the state had not proved the element of serious bodily injury; (2) failed to move for a directed verdict; (3) failed to subpoena the physicians who treated McMillan's injury; (4) failed to cross-examine McMillan or Sergeant Weaver; and (5) failed to ask for a continuance after the state enhanced Wigfall's indictment to charge the more serious offense of aggravated robbery.

The standard for assessing the effectiveness of counsel was announced in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires the defendant to prove two things: (1) counsel's performance was deficient under an objective standard of reasonableness, id. at 687-88, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When assessing whether an attorney's performance was deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; Andrews v. Collins, 21 F.3d 612, 621 (5th Cir. 1994). The defendant, moreover, may not simply allege but must "affirmatively prove" prejudice, which means "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466

U.S. at 693, 687; Lockart v. Fretwell, 113 S. Ct. 838, 842 (1993).

Wigfall contends that his trial counsel was deficient for failing to adequately argue that McMillan did not suffer a serious bodily injury or to move for a directed verdict due to the lack of such evidence. These contentions are without merit because we have concluded that there was sufficient evidence to support Wigfall's conviction. Thus, counsel's failure to fully develop this argument or move for directed verdict on this basis was objectively reasonable. Accordingly, Wigfall cannot demonstrate deficiency under Strickland.

Wigfall next argues that his counsel's failure to subpoena the physicians who treated McMillan constituted ineffective assistance. Specifically, he contends that his trial counsel had an obligation to elicit testimony from these physicians regarding the nature and extent of McMillan's injuries, testimony which Wigfall hypothesizes would have revealed that McMillan did not suffer from a serious bodily injury. First, Wigfall's counsel may have opted not to call these physicians because he surmised that their testimony may have damaged, not strengthened, Wigfall's case. It would not be unreasonable for Wigfall's counsel to conclude that a physician who wires a patient's mouth shut for four weeks would testify that his patient suffered from a serious bodily injury. Thus, Wigfall has not overcome the strong presumption that counsel's decision not to call a witness was an objectively reasonable sound trial strategy. Murray v.

Maggio, 736 F.2d 279, 282 (5th Cir. 1984); see also Strickland, 466 U.S. at 690-91 (noting that reasonable strategic decisions do not constitute defective performance). Second, Wigfall offers no evidence to support his speculative assertion that the testimony of these physicians would have been favorable to him. Without affirmative proof that such testimony would have been favorable, Wigfall has failed to affirmatively prove that failure to call these physicians prejudiced the outcome of his trial. Ross v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983); see also Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir.) (noting that speculative assertions about testimony of uncalled witnesses must be approached with great caution), cert. denied, 479 U.S. 1030 (1987).

Wigfall further asserts that his trial counsel was ineffective because he did not cross-examine McMillan or Sergeant Weaver. In particular, Wigfall maintains that had these individuals been cross-examined, they would have more fully revealed the extent of McMillan's injury, which, in turn, could have caused the jury to entertain a reasonable doubt as to whether McMillan suffered serious bodily injury. Again, we note that Wigfall has not overcome the presumption that the decision not to cross-examine these witnesses was sound trial strategy. Rigorous cross-examination of the victim in an attempt to garner an admission that her injury was not serious may well have backfired. Likewise, the decision not to cross-examine Sergeant Weaver, who merely testified that McMillan "was in a great deal

of pain," may reasonably have been considered unlikely to elicit favorable evidence. Even assuming, arguendo, that Wigfall's counsel was deficient for failing to cross-examine these witnesses, he has not offered any evidence to demonstrate that this failure altered the outcome of his trial, and his unsupported speculation is insufficient to satisfy the prejudice prong of Strickland.

Wigfall next asserts that his counsel was ineffective for failing to request a continuance upon learning that the state intended to enhance Wigfall's indictment from simple to aggravated robbery. Specifically, Wigfall contends that, had a continuance been granted, it would have provided his counsel enough time to investigate and successfully challenge the admission into evidence a 1975 burglary conviction which was used for sentencing enhancement purposes. Wigfall contends that, given extra time, his counsel could have discovered that the indictment underlying the 1975 burglary conviction was defective because it failed to mention the requisite mental state for burglary. Thus, Wigfall asserts, the underlying indictment was faulty and, if counsel had known of this defect, the extraneous offense could not have been used for enhancement purposes. Our review of the 1975 burglary indictment, however, reveals no such defect. The indictment states that "on April 17, 1975, [Wigfall] did then and there unlawfully *with intent to commit theft*, enter a habitation not then open to the public. . . . without the effective consent of the complainant." (emphasis added). This

indictment therefore contains proper reference to all of the requisite elements of burglary under the Texas Penal Code, which states, "A person commits an offense if, without the effective consent of the owner, he . . . enters a habitation, or a building (or any portion of a building) not then open to the public, *with intent to commit a felony or theft* . . . ." TEX. PENAL CODE ANN. § 30.02(a) (emphasis added). Because the indictment is valid, it was not deficient performance for Wigfall's counsel to determine that a continuance would not assist his client. Thus, Wigfall has not met his burden of proving deficient performance, and this contention is without merit. Furthermore, we note that Wigfall has proffered no evidence to show that, had a continuance been asked for and granted, his counsel would have discovered any information which would have altered the outcome of his trial. Accordingly, Wigfall has also failed to bear his burden of proving that the alleged defect was prejudicial.

## IV. CONCLUSION

For the foregoing reasons, we AFFIRM.