NO. 46005-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

GEOFF SETH RYAN SAGUN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 13-1-00315-5

BRIEF OF RESPONDENT

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Geoff Ryan Sagun (hereafter 'Sagun') was charged by Information with Rape of a Child in the First Degree, three counts of Child Molestation in the First Degree, Rape in the Second Degree, and Indecent Liberties with Forcible Compulsion, and Attempted Rape in the Second Degree. CP 43-45. The State further alleged that the offenses were part of an ongoing pattern of sexual abuse of the same victim under the age of 18 manifested by multiple incidents over a prolonged period of time. CP 43-45. After hearing testimony, the jury convicted Sagun of three counts of Child Molestation in the First Degree and Indecent Liberties. CP 230-34, 238. The jury also found the offenses were part of an ongoing pattern of sexual abuse. CP 231-35, 239. On the indecent liberties with forcible compulsion charge, the jury also found the victim was under the age of fifteen at the time of the offense. CP 239. The trial court sentenced Sagun to 300 months to Life. CP 273. Sagun's appeal timely follows.

The testimony at trial showed that A.G. was 15 years old at the time of trial. RP 228. She met the defendant when she was eight years old and living in Battle Ground, Washington. RP 229. The defendant was

married to A.G.'s mother. RP 230. A.G. testified that she and Sagun would snuggle on the couch in a "spooning" position. RP 232.

A.G. testified that Sagun put his hands in her pants, held her arm down so she couldn't force him off of her and put his fingers inside and moved them around. RP 233-36, 238. A.G. tried to get her arm free, but was unable to. RP 237. On another occasion, Sagun touched A.G.'s breasts underneath her clothes. RP 240. A.G. removed his hand from under her shirt and Sagun then attempted to put his hand down her pants. RP 241. On a third occasion, Sagun again touched her "down [her] pants." RP 241. On a fourth occasion, Sagun attempted to put A.G.'s hands down his pants. RP 242. A.G.'s hand actually went down Sagun's pants and touched the skin inside his pants. RP 243. A.G. pulled her hand away. RP 243. On yet another occasion, Sagun held both of A.G.'s hands down and tried to unbutton her pants. RP 244-45. A.G. resisted and was able to get away. RP 245. On this occasion, Sagun also touched A.G.'s breasts. RP 246.

On each of the occasions that A.G. described for the jury, she told Sagun to stop; and each time, no one else was in the house. RP 247.

When initially contacted by police, A.G. denied having made accusations against Sagun. RP 256-57. She testified that she was not telling the truth during this initial denial. RP 257.

Sagun did not testify at trial. Defense counsel did not request a lesser-included jury instruction and no reason was indicated on the record for this decision. RP 539.

I. SAGUN HAD THE BENEFIT OF EFFECTIVE COUNSEL

Sagun claims he received ineffective assistance of counsel because his attorney did not request a lesser-included instruction for three counts of Child Molestation in the First Degree. Sagun cannot show that his attorney was deficient or that any potential deficiency prejudiced him. Sagun's claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth

> Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not

ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury

acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance. *Strickland*, 466 U.S. at 689-91.

Sagun's defense attorney was effective. In reviewing a claim of ineffective assistance of counsel, this Court may only consider facts within the record. *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). If defense's actions can be characterized as legitimate trial strategy or tactics, the performance is not deficient. *Kyllo*, 166 Wn.2d at 863; *Garrett*, 124 Wn.2d at 520. These strategies and tactics must still be reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000). An "all or nothing" approach is a legitimate trial strategy.

The State agrees, that had Sagun requested a lesser-included instruction of Assault in the Fourth Degree, that the law would have supported it. *See State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) (holding that Assault in the Fourth Degree is a lesser-included offense to Child Molestation in the Second Degree). In *State v. Grier*, *supra*, the Supreme Court found that the decision to forego a lesser included instruction is a joint decision between the defendant and his attorney. *Grier*, 171 Wn.2d at 32. The record is silent as to whether Sagun concurred in the decision to present the case as an "all or nothing" case to the jury. To succeed in a claim of ineffective assistance of counsel, the appellant must show from the record that his attorney's conduct fell below an objectively reasonable standard. *See id.* As the Supreme Court noted in *Grier*, "Grier and her defense counsel could reasonably have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.... That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 43 (internal citations omitted). Sagun points to nothing in the record that overcomes the presumption that his attorney was effective in his performance.

Not only can Sagun not show deficient performance, but he also fails at showing actual prejudice. In order for Sagun to prove prejudice, this Court would have to find that the jury compromised its verdict because it wanted to find Sagun guilty of some crime, and had no choice but to convict him of child molestation even though they felt the evidence did not prove him guilty of the charge. *See Grier*, 171 Wn.2d at 43-44. This Court must presume that the jury acted according to the law. *Strickland*, 466 U.S. at 694. As the jury returned guilty verdicts, this Court must presume that the jury found Sagun guilty beyond a reasonable doubt of those offenses. *See Grier*, 171 Wn.2d at 43-44. Therefore, even if his attorney had proposed a lesser included instruction for Assault in the Fourth degree, and had the trial court given this instruction, the jury still would have convicted on the greater offenses. Sagun has failed to show any prejudice from his counsel's failure to request a lesser included instruction.

Sagun's claim of ineffective assistance of counsel fails. His convictions should be affirmed.

C. **CONCLUSION**

Sagun cannot show that his attorney's performance was deficient, or that any deficient performance prejudiced him. Sagun's convictions for Child Molestation in the First Degree should be affirmed.

DATED this 3rd day of November, 2014.

Respectfully submitted:

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