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Washington State
Supreme Court

Supreme Court no. 97499-3.
Court of Appeals no. 77328-3-I

IN THE
SUPREME COURT OF THE STATE
OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

- VS -

EDUARD MOZQUEDA,

PETITIONER.

PETITION FOR REVIEW

EDUARD MOZQUEDA, PETITIONER

EDUARD MOZQUEDA, # 399785
COYOTE RIDGE CORRECTIVE CENTER
POST OFFICE BOX 769 - GA-42
COWELL, WA 99326

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A. IDENTITY OF PETITIONER

PETITIONER ASKS THIS COURT TO ACCEPT REVIEW OF THE COURT OF APPEALS DECISION TERMINATING REVIEW DESIGNATED IN PART B OF THIS PETITION.

B. COURT OF APPEALS DECISION

PETITIONER SEEKS REVIEW OF THE ENTIRE DECISION OF THE COURT OF APPEALS AFFIRMING HIS CONVICTIONS AND SENTENCE. A COPY OF THE DECISION IS ATTACHED AS APPENDIX A. A COPY OF THE ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION IS ATTACHED AS APPENDIX B.

C. ISSUES PRESENTED FOR REVIEW

1. DURING TRIAL, VARIOUS WITNESSES TESTIFIED TO OUT-OF-COURT STATEMENTS OF THE COMPLAINING WITNESS AND HER MOTHER, REPEATING THE COMPLAINING WITNESS'S OUT-OF-COURT ALLEGATION IMPLICATING PETITIONER. VAN TRIAL COUNSEL'S PERFORMANCE DEFICIENT WHERE HE FAILED TO MAKE, ARGUE, AND

PREVENTING PROPER HEARWAY OBJECTIONS TO THIS TESTIMONY?

2. THE STATEMENTS OCCURRED WEEKS, MONTHS AND YEARS AFTER THE ALLEGED INCIDENTS; WERE NOT OFFERED AFTER IMMEDIATELY PERCEIVING THE DEFENDANT IN A LINE-UP OR PHOTO MONTAGE; AND WERE NOT OFFERED TO REBUT AN ALLEGATION OF RECENT FABRICATION. GIVEN THE ABOVE, ARE THE HEARWAY EXCEPTIONS FOR FACT OF THE COMPLAINT, PURPOSE OF IDENTIFICATION, OR REBUTTAL OF RECENT FABRICATION INAPPLICABLE TO THE STATEMENTS IDENTIFYING PETITIONER?

3. EVEN IF THE HEARWAY EXCEPTION FOR MEDICAL TREATMENT AND DIAGNOSIS, OR OTHER EXCEPTIONS APPLY TO SOME HEARWAY IDENTIFICATION STATEMENTS, SHOULD SUCH EVIDENCE HAVE BEEN EXCLUDED UNDER ER 403 GIVEN THE RISK OF UNFAIR PREJUDICE AND CONCERN OF CUMULATIVE TESTIMONY?

4. THE CASE HINGED ALMOST EXCLUSIVELY ON THE TESTIMONY OF THE COMPLAINING WITNESS'S TESTIMONY THAT CONTAINED NOTABLE INCONSISTENCIES, OTHER TRIAL TESTIMONY ESTABLISHED MULTIPLE MOTIVES TO LIE, AND THE PROSECUTOR

relied on the repeated hearsay statements of identification to bolster the complaining witness's credibility. Is there a reasonable probability the improper testimony affected the outcome of trial?

D. STATEMENT OF THE CASE

Petitioner relies upon the procedural and factual summaries contained in his appellate briefs filed in the Court of Appeals as well as those stated in the Court of Appeals decision. Additional facts pertinent to the issues presented are discussed in the argument sections to which they pertain.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

As argued below, the decision of the Court of Appeals is in conflict with other decisions of the Supreme Court and the Court of Appeals. Accordingly, review is appropriate under RAP 13.4(b)(1) and (2).

1. DEFENSE COUNSEL WAS DEFICIENT FOR FAILING TO OBJECT TO HEARWAY BY MULTIPLE WITNESSES.

THE PRIMARY DISPUTED ISSUE AT TRIAL WAS THE CREDIBILITY OF THE COMPLAINING WITNESS, G.M.C. THE STATE HAD NO CORROBORATING PHYSICAL EVIDENCE AND THE CORE OF OTHER WITNESS TESTIMONY CONSISTED OF SECOND-HAND REPETITION OF G.M.C.'S OUT-OF-COURT ALLEGATIONS. G.M.C.'S DISCLOSURES SUFFERED FROM TROUBLING INCONSISTENCIES. TRIAL TESTIMONY FROM VARIOUS FAMILY MEMBERS ESTABLISHED THAT G.M.C.'S MOTHER HAD ACCUSED PETITIONER OF MULTIPLE THEFTS, WAS NOT AWARE OF THE ACCUSATION UNTIL AFTER J.A.M.'S DISCLOSURES AT THE CHURCH, HAD A MOTIVE TO INFLUENCE G.M.C. TO AMEND THE DATES OF HER ACCUSATION TO MAKE THEM MORE PLAUSIBLE, AND HAD SPOKEN TO G.M.C. SEVERAL TIMES BETWEEN G.M.C.'S INITIAL COMPLAINT AT THE CHURCH AND THE TRIAL.

THE STATE ARGUED IN CLOSING THAT THE ENTIRETY OF ITS CASE HINGED ON G.M.C.'S CREDIBILITY

and sought to bolster her credibility through reference to the testimony of multiple witnesses who had repeated G.M.C.'s out-of-court statements implicating petitioner. In brief, these statements were inadmissible hearsay, not subject to any exceptions, and should have been excluded from trial. However, defense counsel repeatedly failed to object or to preserve proper objections. Defense counsel's failure to object were not the result of a legitimate tactic, resulted in serious prejudice to the trial outcome, and so require reversal.

The federal and state constitution guarantee all criminal defendants the right to effective assistance of counsel. U.S. Const. Amend. 6; Const. Art. 1, § 22; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel is established when (1) counsel's representation was deficient, and (2) the representation prejudiced the defendant. In re Pen. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610

(2001).

more specifically, an ineffective assistance of counsel claim based on a failure to object to the admission of evidence requires a showing that (1) the failure to object was not based on a legitimate strategic or tactical reason, (2) an objection would likely have been sustained, and (3) there is a "reasonable probability" that if the evidence had been excluded the outcome of the trial would have been different. STATE V. SAUNDEN, 91 Wn. App. 575, 578, 581, 958 P.2d 364 (1998) (citing STATE V. McFARLAND, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); STATE V. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996); STRICKLAND V. WASHINGTON, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Where such a claim is established, reversal of the conviction and remand for a retrial is the appropriate remedy. Thomas, 109 Wn.2d at 232.

All three requirements are met here. This court should find petitioner's right to effective assistance of counsel

WAS VIOLATED AND REVERSAL AND
REMAND FOR RETRIAL IS THE
APPROPRIATE REMEDY.

PETITIONER MAINTAINS THAT HE
WAS DEPRIVED EFFECTIVE ASSISTANCE
OF COUNSEL WHEN HIS TRIAL ATTORNEY
REPEATEDLY FAILED TO OBJECT TO
HEARSAY STATEMENTS OF MULTIPLE
WITNESSES. IN PARTICULAR, HE
ARGUES THESE FAILURES WERE NOT
BASED ON A LEGITIMATE TRIAL TACTIC.
MOREOVER, THESE FAILURES WERE
PREJUDICIAL BECAUSE THE TRIAL
CENTERED ON THE CREDIBILITY OF THE
STATE'S COMPLAINING WITNESS G.M.C.,
AND THE HEARSAY STATEMENTS OF
HEALTHCARE AND LAW ENFORCEMENT
PROFESSIONALS SERVED TO BOLSTER
G.M.C.'S CREDIBILITY THROUGH
REPETITION.

IN SUM, THERE IS A REASONABLE
PROBABILITY THAT THE FAILURE TO OBJECT
TO THE IMPROPER HEARSAY PREJUDICED
THE OUTCOME OF PETITIONER'S TRIAL BY
IMPACTING THE VERDICT. THEREFORE,
THIS COURT SHOULD FIND COUNSEL'S
FAILURE TO MAKE AND PRESENT PROPER
OBJECTIONS TO THE HEARSAY STATEMENTS
OFFERED BY VARIOUS TRIAL WITNESSES
CAUSED PREJUDICE AND REQUIRES
REVERSAL FOR RETRIAL. Thomas, 109
W.2d AT 232.

DEFENSE COUNSEL'S FAILURE TO ENFORCE THE TRIAL COURT'S RULING AND PROTECT HIS CLIENT FROM IN-ADMISSIBLE HEARSAY TESTIMONY RELEVANT TO KEY WITNESS CREDIBILITY VIOLATED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH OTHER COURT DECISIONS.

F. CONCLUSION

FOR THE REASONS SET OUT IN THIS PETITION, THIS COURT SHOULD ACCEPT REVIEW OF THIS CASE AND REVERSE PETITIONER'S CONVICTION AND SENTENCE.

DATED: JULY 20, 2019.

Edward Mozqueda
EDUARDO MOZQUEDA, PETITIONER

PRO SE REPRESENTATION

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FINN GUTHRIE, KING COUNTY PROSECUTING
ATTORNEY, WSS4 KING COUNTY COURTHOUSE,
516 THIRD AVENUE, SEATTLE, WA
98104-2362.

DATED: JULY —, 2019.

Edward Morqueda
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APPENDIX " A "

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 EDWARD ALBERTO MOZQUEDA,)
)
 Appellant.)

No. 77328-3-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: April 29, 2019

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2019 APR 29 AM 9:35

HAZELRIGG-HERNANDEZ, J. — To prevail on a claim of ineffective assistance of counsel, defendant must show deficient performance and a reasonable probability of a different outcome. Because the decision not to object to out-of-court statements was a reasonable tactical decision, and because the jury would have received very similar information even with the objections, Mozqueda’s ineffective assistance of counsel claim fails. We affirm.

FACTS

On March 6, 2016, G.M.C. disclosed to her mother, A.C., that she had been sexually assaulted by her brother-in-law, Edward A. Mozqueda. G.M.C. provided a written statement to the police that day. She alleged that Mozqueda had started touching her inappropriately when she was seven, and that the most recent assault was in February, 2016. She was examined by doctors at Seattle Children’s Hospital, and made statements regarding the assault to the doctors. G.M.C. was

also seen by a nurse practitioner and social worker at the Harborview Center for Sexual Assault and Traumatic Stress, and made statements regarding the assault to them. She also participated in a forensic interview with law enforcement.

Mozqueda was charged with one count of rape of a child in the first degree and one count of rape of a child in the second degree. At trial, G.M.C. testified regarding two incidents where Mozqueda forced her to perform oral sex on him. The State introduced statements from A.C., law enforcement, and several medical professionals that G.M.C. identified Mozqueda as her assailant. Mozqueda objected to the statements during the testimony of A.C., but the trial court permitted them as statements of identification. The State also elicited testimony from its witnesses that G.M.C. had not identified anyone else. Mozqueda elicited testimony regarding animosity between A.C. and Mozqueda, and testimony that suggested A.C. had coached G.M.C. after her initial accusation. Mozqueda also elicited testimony regarding G.M.C.'s inconsistency regarding the timing of the assaults. The jury returned guilty verdicts on both counts.

Mozqueda appeals, claiming his counsel was ineffective for failing to object to the statements of third party witnesses that G.M.C. identified him as her assailant.

DISCUSSION

I. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, Mozqueda must demonstrate (1) counsel's performance was deficient and (2) resulting prejudice. State v. Estes, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017) (citing Strickland v.

Wash., 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Performance is deficient if it falls below an objective standard of reasonableness based on all the circumstances. Id. (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). The defendant “must overcome ‘a strong presumption that counsel’s performance was reasonable.’” State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Performance is not deficient when counsel’s conduct can be characterized as reasonable trial strategy. Id. (citing Kyllo, 166 Wn.2d at 863). “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores-Oretega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Given the circumstances of this case, declining to object to the statements identifying Mozqueda was a reasonable tactical decision. G.M.C. never identified any other person and her identification of Mozqueda was never disputed by the parties. Instead, the defense argued that G.M.C. had fabricated her story, either to cover up activity with a boyfriend or at the behest of A.C because of A.C.’s animosity toward Mozqueda. Additionally, when Mozqueda’s counsel did object to similar statements, the court made it clear that it did not consider statements of identification hearsay. This may have impacted defense trial strategy moving forward.

Declining to object to the statements of the treating physician, nurse and social worker who assessed G.M.C. pursuant to the case was also a reasonable tactical decision. A hearsay exception clearly permits statements for the purposes

of medical treatment to be admitted at trial. ER 803(a)(4). G.M.C. was being treated by medical professionals as a result of the assaults, and Mozqueda concedes that statements by a child victim identifying a family member fall within this exception because medical professionals have a duty to protect children from future abuse. See State v. Butler, 53 Wn. App. 214, 221, 766 P.2d 505 (1989), (citing United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985)).

Mozqueda instead argues that if counsel had objected, those statements would have been excluded under ER 403 because their unfair prejudice substantially outweighed the statements' probative value. We are unconvinced that the trial court would have excluded the statements. While the statements were cumulative of other evidence and prejudicial to Mozqueda, Mozqueda has not shown that the resulting prejudice substantially outweighed the significant probative value of the statements. Because declining to object to those statements was a reasonable tactical decision, and because Mozqueda has not shown that those statements would have been excluded if defense counsel had made a proper objection, we find no ineffective assistance of counsel.

Furthermore, it appears that even sustained objections to the statements would have provided little help to Mozqueda. The State regularly followed up the identification questions by asking its witnesses if G.M.C. ever identified anyone else as her assailant. The witnesses consistently noted that she had not. While the corroborative value of this question was not identical to the statements identifying Mozqueda, it bolsters G.M.C.'s credibility in the same way: as to

identity, her accusations remained consistent. No valid objection would have prevented that testimony.

For the same reason, Mozqueda has not demonstrated the necessary prejudice for reversal. In order to show prejudice, the defendant must show there is a reasonable probability the outcome of the proceedings would have been different. Estes, 188 Wn.2d at 458 (citing Kyllo, 166 Wn.2d at 862). The defendant "must show more than a 'conceivable effect on the outcome.'" Id. (quoting State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006)). Here, because the jury would have received similar information corroborating G.M.C.'s allegations even if Mozqueda's counsel had made objections that were sustained, we cannot find a reasonable probability the outcome of the proceedings would have been different.

Affirmed.

WE CONCUR:

Andrus, J.

[Signature]

[Signature]

APPENDIX " B "

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)	No. 77328-3-1
)	
Respondent,)	DIVISION ONE
)	
v.)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
EDWARD ALBERTO MOZQUEDA,)	
)	
Appellant.)	
_____)	

The appellant, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge

Edward Mozqueda # 399785
Coyote Ridge Correctional Center
Post office Box 769-GA-42
Connell WA 99326



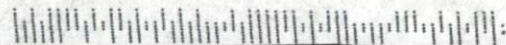
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