I02487-8

NO. 84763-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT R. D. CALLIOUX,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW OF DECISION OF COURT OF APPEALS TERMINATING REVIEW RAP 13.4

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A. IDENTITY OF PETITIONER Petitioner Robert R. D. Callioux, Appellant below, 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B. COURT OF APPEALS DECISION The unpublished decision of the Court of Appeals filed October 2, 2023 affirmed the conviction of Petitioner in King County Superior Court No. 21-1-02497-4. A copy of the decision is in Appendix A. Petitioner seeks review of the issues designated in part C of this Petition and reversal and new trial.

C. ISSUES PRESENTED FOR REVIEW

I. Desirae Clough was the alleged victim's cousin and best friend whose presence with her and Petitioner during the charging period was corroborated by two witnesses. Desirae was listed as a trial witness by defense counsel and her anticipated testimony denying any criminal activity occurred during that period is set forth in the record. She was conceded to be the key defense witness by the trial prosecutor who, after personally interviewing her, acknowledged her testimony alone could establish reasonable doubt. After stating on the record that he would call her to testify, defense counsel did not.

WHERE PETITIONER MEETS THE *McFarland* TEST ("defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel"), MUST THE CONVICTION BE REVERSED FOR PREJUDICIAL DENIAL OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

ISSUES OF FIRST IMPRESSION

A. WHERE DEFENSE COUNSEL ENDORSES THE KEY DEFENSE WITNESS ON THE WITNESS LIST WHOSE HIGHLY FAVORABLE TESTIMONY IS IN THE RECORD AND CENTRAL TO THE DEFENSE, IS IT INEFFECTIVE ASSISTANCE NOT TO CALL THE LISTED WITNESS TO THE STAND IN THE ABSENCE OF AN OVERRIDING TACTICAL OR STRATEGIC REASON SHOWN IN THE RECORD?

Fletcher v. State, 177 So.3d 1010 (Fla.Dist.Ct.App. 2015); *In re Fletcher,* 240 So.3d 879 (Fla.Dist.Ct.App. 2018)

B. WHERE THE PRESENCE OF THE KEY DEFENSE WITNESS INSIDE THE APARTMENT OF THE DEFENDANT ON THE OCCASIONS WHEN THE COMPLAINING WITNESS ALLEGES CRIMINALITY IS FULLY CORROBORATED, IS IT CONCEIVABLE THAT A REASONABLE DEFENSE LAWYER WOULD FAIL TO CALL THE ONLY PERCIPIENT WITNESS WHO COULD ESTABLISH REASONABLE DOUBT?

Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999)

C. According to the Court of Appeals, the failure of defense counsel to call the key witness to testify at trial waived appellate review of the objection to impeachment of the witness based on pending but unproven criminal charges:

DID THE FAILURE OF DEFENSE COUNSEL TO CALL THE KEY WITNESS RESULTING IN FAILURE TO PRESERVE APPELLATE REVIEW CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL?

D. STATEMENT OF THE CASE

1. Nature of Action Petitioner Robert Callioux was charged by Amended Information, CP133-34, with three sexual offenses against his then-minor daughter, N. He was convicted as charged by a jury. He had no prior criminal history. He was sentenced by Judge Aimee Sutton to a minimum term of 192 months imprisonment on Count I and 130 months on Counts II and III all to be served concurrently with a maximum term of life imprisonment. CP202-14

2. Relationship of N and First Cousin Desirae Clough

N's closest friend was her first cousin, Desirae Clough. N said between ages 4 to 9, Desirae spent overnights with her and Robert on

her visitation weekends. N admitted she did not have a good recollection of the frequency of these visits. "I don't have full memories ... I don't have a full recollection of it." VRP465

Shawna Jones is a sister of Robert. N and Desirae are her nieces. Shawna testified that whenever Robert had overnight visitation with N, Desirae would also visit "every weekend." VRP543,547

Linda Callioux is the sister of Robert, mother of Desirae and aunt to N. VRP580-82 Linda testified that N and Desirae grew up together and were so close "they were more like sisters than cousins." VRP594 When N was 4 and Desirae 6, the cousins began overnight weekend visits together with Robert. VRP584-85,595 Linda stated that whenever Robert had weekend visits with N, Desirae would always join them. VRP584-85 "That's about the time that Desirae and [N] would go and stay every other weekend at Robert's house." *Id.* N never had an overnight at Robert's apartment without Desirae also being present. VRP584-97

3. <u>The Anticipated Testimony of Desirae Clough in the Record</u>

There are two sources of the anticipated trial testimony of Desirae Clough in the record which are consistent with one another on all major points, corroborated and unrebutted by the state. The first source is a summary in the Certification for Determination of Probable Cause of a recorded statement taken by the lead investigator, Detective Mades of the Kirkland Police Department who both took the statement and prepared the Certification containing the summary. CP1-11

In the statement given to the detective, Desirae categorically denied any criminal activity occurred between Petitioner and N and denied ever witnessing "anything strange or unusual" between them during the years they were together in Petitioner's apartment ("Never"). "Desirae stated Robert was a good uncle." When the detective asked if she "ever saw Robert touch [N] in an inappropriate way," Desirae responded "Never." The girls would typically play together in N's bedroom while Robert was located on the living room couch "doing his own thing."

The second statement in the record was personally taken by the trial prosecutor shortly before trial and summarized in the state's Trial Memorandum. CP72-98 In that Memorandum, Desirae repeated her denial of witnessing any criminal activity at any time between Petitioner and N. The prosecutor informed the court and defense counsel that during the prosecutor's interview with Desirae, she clearly stated she was present "at the defendant's home *every weekend* [N] was there" and "because she was present every weekend [N] was present that the defendant could not possibly have sexually abused [N.]" [prosecutor's emphasis in text], quoted in *Callioux,* Slip op. at 2

As a result of her personal interview with Desirae, the trial prosecutor drew the following conclusions which she provided to the court and defense counsel, all of which are in the record and all of which were ignored by the Court of Appeals. First, Desirae was the only defense witness physically present with N and Petitioner at his apartment during

the entire charging period. Second, Desirae would deny any criminal activity occurred during that time. Third, Desirae was the key witness for the defense and against the state. Fourth, the testimony of Desirae would be so powerfully exculpatory that by itself it would "potentially cause[ ] reasonable doubt in the jury."

4. Critical Importance of Desirae Clough's Testimony is Evident In the Record

Desirae Clough was recognized by the state as the "key" witness for the defense and was of "central" importance to the theory of the defense: denial and cast doubt on complainant's memory and credibility. *State v. Lee,* 188 Wn.2d 473, 501 (2017). Desirae's trial testimony would have been helpful to the defense in the following ways:

First, during the six-year charging period Desirae was effectively the only eyewitness at the scene of the alleged crimes. As acknowledged by the state and ignored by the Court of Appeals, she was the *only* contemporaneous witness to the interactions between the accuser and accused inside the apartment from the time N was 4 until age 10. CP77-78

Second, Desirae could contradict N's self-serving speculation that Desirae was only sporadically spending the night with her and Robert during the six years. N admitted her poor or non-existent memory on this issue in her testimony. VRP465 Desirae, who is two years older than N, had a much clearer memory of the time and was consistent in her interviews with the police and prosecutor that she was a regular overnight

visitor with Robert and N on N's visitation weekends. This critical testimony was corroborated by the testimony of Linda and Shawna and ignored by the Court of Appeals.

Third, Desirae could establish how highly unlikely it would be that the two closest friends and cousins, "like sisters," could spend six years in a small apartment, sharing a bedroom, with one being regularly sexually abused at nighttime while the other never saw or heard her in Robert's bedroom or was told, or otherwise knew, something was wrong.

Fourth, as the prosecutor recognized but the Court of Appeals overlooked, the testimony of Desirae alone had the potential of creating reasonable doubt. CP78 In a case where there was no corroboration of the accuser's accusations, the prosecutor repeatedly told the jury it could convict on N's testimony alone. VRP652,658 Had Desirae testified as anticipated, the prosecutor would have had a far more difficult burden to convince the jury to completely disregard her exculpatory evidence. The prosecutor would have had to explain how the jury could avoid the doubtfulness of the contention that for six years N was sexually abused while Desirae was literally a few feet away and saw, heard, knew or suspected nothing.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The decision of the Court of Appeals is in conflict with: *State v. Jones*, 183 Wn.2d 327 (2015); *State v. Thomas*, 109 Wn.2d 222 (1987); *State v. McFarland*, 127 Wn.2d 322 (1995)

I. PETITIONER MEETS THE *McFarland* TEST

In *McFarland* this Court established a two-part test for review of claims of ineffective assistance of counsel on direct appeal. The first part is that there is a "presumption of effective representation" which "can be overcome only by a showing of deficient representation based on the record established in the proceedings below." The second part is that "[b]ecause the presumption runs in favor of effective representation, the defendant must show in the record *the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.*" 127 Wn. 2d at 336 (emph. ad.).

Under the *McFarland* test, a defendant may show deficient performance by his counsel either by an affirmative showing in the record that counsel's inaction is objectively unreasonable,[1] or by showing the absence in the record of any indication of legitimate tactics or strategy for counsel's inaction.[2]

Here, the record clearly shows the identity of the key defense witness, the specific content of her favorable testimony as expressed to the investigating detective and the trial prosecutor, her endorsement as a witness for the defense and the representations of counsel to the court that she would be called to the stand. The record also shows "trial counsel

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1 *State v. Thomas,* 109 Wn.2d at 230-31 (after quoting from the record of voir dire of the defense expert whose testimony was excluded for insufficient qualifications, the Court concluded: "in failing to discover the alcohol trainee's total lack of qualifications, trial counsel's performance was deficient.").

2 *State v. Jones,* 183 Wn.2d at 327 (Where "trial counsel offered absolutely no reason for failing to interview these three witnesses," the Court held the record showed "deficient performance.").

offered absolutely no reason for failing to" call her as a witness for the defense. This amply satisfies *McFarland.*

Moreover, the record clearly establishes the failure to call the one percipient witness central to the defense theory of the case prejudiced Petitioner. The trial prosecutor herself acknowledged on the record that Desirae was not only the key witness for the defense but also that her testimony alone had the capacity to produce reasonable doubt. *Compare: State v. Thomas,* 109 Wn.2d at 232 ("trial counsel's deficiency in failing to discover his expert's lack of qualifications ... prejudice[d] Thomas"); *State v. Jones,* 183 Wn.2d at 344 ("there is a reasonable probability that the failure to interview and to call Hamilton affected the outcome of the trial")

Here, the Court of Appeals ignored this analysis. Instead, the court relied on *State v. Linville,* 191 Wn.2d 513 (2018) for the proposition that where there are legitimate competing hypotheses for counsel's inaction, the reviewing court may choose the hypothesis most favorable to the state. *Linville* is clearly distinguishable. First, the state here is bound by its concession in the record that the defense witness was critical to the defense case and that her testimony could be the difference between a guilty verdict or acquittal. Second, the law governing failure to call a witness whose testimony could affect the outcome of the trial is set forth in *Jones,* not *Linville.* Third, having established in the record the critical necessity of Desirae's testimony and having satisfied the second part of the *McFarland* test that the record is void of any semblance of "legitimate

strategic or tactical reasons" for not calling her, there is no alternative "hypothesis" – there is only the *fact* of deficient representation. Fourth, where the record shows counsel endorsed the witness on the defense witness list and represented to the court he would call her to the stand and where the record reveals no legitimate basis for not calling her to the stand, it is absurd, and contrary to *McFarland,* to hypothesize out of thin air that there might be a tactical or strategic reason for prejudicial inaction.

The Court of Appeals mentions only the first part of the *McFarland* test that deficient representation must be based on the record below. But the court fails to address the second part of the *McFarland* test: that if the record below shows the "absence of legitimate strategic or tactical reasons" for the otherwise deficient representation, the presumption is overcome. The appellate court's faulty reasoning is exposed by its citation to its analysis in its opinion in *State v. Heng,* 22 Wn. App. 717, 512 P.3d 942 (2022), *review granted,* discussed next. Slip op. at 9

2. The decision is in conflict with decisions of the Court of Appeals in: *State v. Heng, supra; State v. Byrd,* 30 Wn.App. 794 (1981) *State v. Jury,* 19 Wn.App. 256 (1978); *State v. Robinson,* 79 Wn.App. 386 (1995)

Although the Court of Appeals here does not expressly cite *McFarland,* it does cite its recent decision in *Heng* which does expressly cite *McFarland.* The critical difference between the two cases is that while *Heng* addresses and references *both* prongs of *McFarland, Callioux* addresses only the first part and ignores the controlling second part. *Compare: Heng*, 22 Wn.App.2d at 744 ("we will not presume deficient

performance from a silent record") *with Callioux,* Slip op. at 9 (same). *Compare: Heng, id.* ("Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.") *with Callioux* (...).

As the author of both *Heng* and *Callioux* comments in another context in *Heng*, the court in *Callioux* "does not meaningfully address" *McFarland* as it did in *Heng.* This is reversible error.

Petitioner cited to the court a number of its own cases supporting reversal for deficient representation by counsel. The court erroneously deemed them all distinguishable. Slip op. at 10 *State v. Byrd* provides a good example of authority directly on point. *Byrd* was a rape case where the record was supplemented to show that the alleged victim was "in a jovial mood" when entering the defendant's apartment. The Court of Appeals had no difficulty apprehending the evidentiary value of this testimony from the uncalled witness. "The failure of trial counsel to interview and call [witness] as a defense witness ... *cannot be justified.*" 30 Wn.App. at 800 (emph. ad.).

In reaching this conclusion the *Byrd* court acknowledged the presumption of counsel's competence but recognized the presumption:

> "can be overcome by showing ... that *counsel failed ... to determine what matters of defense were available or failed to allow himself enough time for reflection and preparation for trial."*

Byrd, 30 Wn.App. at 799, quoting *Jury,* 19 Wn.App. at 256 (emph.ad.).

Accordingly, the Court of Appeals concluded: Failing to call the favorable defense witness to the stand was an "omission[] which no reasonably competent counsel would have committed." *Byrd* at 799, quoting *Jury* at 264.[3]

The same is true here only Petitioner's case presents a far stronger showing of deficient representation and concomitant prejudice.

3./4. Significant Questions of Law Under the State and Federal Constitutions and of Substantial Public Interest are Involved and Should be Determined by the Supreme Court

A. WHERE DEFENSE COUNSEL ENDORSES THE KEY DEFENSE WITNESS ON THE WITNESS LIST WHOSE HIGHLY FAVORABLE TESTIMONY IS IN THE RECORD AND CENTRAL TO THE DEFENSE, IT IS INEFFECTIVE ASSISTANCE NOT TO CALL THE LISTED WITNESS TO THE STAND IN THE ABSENCE OF AN OVERRIDING TACTICAL OR STRATEGIC REASON SHOWN IN THE RECORD

The issue of whether the failure of trial counsel to call the key defense witness to testify after endorsing her on the defense witness list and representing to the court during trial that she would be called to the stand appears to be a matter of first impression. But other jurisdictions have considered the issue. In a factually similar case on point, a Florida Court of Appeal initially held an appellant in a child molestation case in which "there was no physical evidence of abuse" had made a *prima facie* showing of prejudicial ineffectiveness for failure to call a key defense

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[3] The standard of *no reasonably competent counsel would fail to ...* applied in *Byrd* and *Jury* is fully consistent with the current standard of *no reasonable counsel would ...* followed by the United States Supreme Court. *Rompilla v. Beard,* 546 U.S. 374, 389, (2005); *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

witness. *Fletcher v. State,* 177 So.3d 1010, 1014-15 (Fla.Dist.Ct.App. 2015); *In re Fletcher,* 240 So.3d 879, 880 (Fla. Dist.Ct.App. 2018).

In *Fletcher,* defense counsel had "originally placed ... on the witness list," two key witnesses who could support the defense theory of the case. 177 So.3d at 1012. In closing argument, defense counsel explained the theory of defense to the jury but her unexplained failure to call the key witnesses in support of the theory meant there was no evidentiary support for it. 177 So.3d at 1014; 240 So.3d at 880.

On first appeal, Fletcher claimed "defense counsel was ineffective for failing to call [the] two key defense witnesses." 177 So. 3d at 1012. The Florida court noted that "the defendant established that defense counsel was aware of these two potential witnesses by asserting that they originally appeared on the defense witness list." 177 So. 3d at 1014. The *Fletcher* court found merit in the appellant's position that the testimony of the two witnesses "would have changed the outcome of the trial" and therefore reversed and remanded to the trial court for further proceedings. 177 So.3d at 1014-15.

On remand, however, the trial court denied relief after conducting an evidentiary hearing. 240 So.3d at 879. Fletcher again appealed to the Florida Court of Appeal and again the court reversed the trial judge but this time ordered a new trial. 240 So.3d at 881. The court began its analysis by stating the 2-part *Strickland* test and then enunciating the general rule flowing from *Strickland*: "The failure to call a witness can

constitute ineffective assistance of counsel if the witness might be able to cast doubt on the defendant's guilt." *In re Fletcher,* 240 So.3d at 880.

The Florida appellate court observed that the uncalled "two witnesses would have provided testimony" in support of the defense theory "central to Appellant's defense at trial, *a defense that would have cast doubt on Appellant's guilt if believed by the jury.*" 240 So.3d at 881. (emph.ad.) The *Fletcher* court therefore held that there was no excuse for "counsel's otherwise deficient performance for failing to call these two exculpatory witnesses."

> "Thus, we find there is a reasonable probability that if defense counsel had presented the testimony of these two witnesses, the jury would have returned a verdict of not guilty." *Id.*

Although this issue of first impression was squarely presented and fully briefed to the Court of Appeals, the issue was ignored and the court did not even cite *Fletcher* let alone "meaningfully address" it.

B. WHERE THE PRESENCE OF THE KEY DEFENSE WITNESS INSIDE THE APARTMENT OF THE DEFENDANT ON THE OCCASIONS WHEN THE COMPLAINING WITNESS ALLEGES CRIMINALITY IS FULLY CORROBORATED, IT IS INCONCEIVABLE THAT A REASONABLE DEFENSE LAWYER WOULD FAIL TO CALL THE ONLY PERCIPIENT WITNESS WHO COULD ESTABLISH REASONABLE DOUBT

The Ninth Circuit Court of Appeals opinion in *Hart v. Gomez,* 174 F.3d 1067 (9th Cir. 1999) is directly on point on the facts and law. Hart was charged and convicted of molesting his daughter in the State of California. His trial involved a virtually identical fact-pattern where an

uncorroborated complaining witness alleged sexual misconduct against her by her father over a lengthy period of time on weekends in a single location when there were supposedly never any other people present. 174 F.3d at 1068. The difference in the two cases is that in *Hart* "the key defense witness" testified in front of the jury, at 1073, that she was present on each of the alleged criminal occasions but there was no corroboration of her presence due to ineffective counsel, whereas in Petitioner's case the key defense witness did *not* testify in front of the jury due to ineffective counsel but corroboration was adduced of the witness' anticipated testimony that she was present on each of the alleged criminal occasions. In other words, *Callioux* is the mirror image of *Hart.*

Callioux presents an issue of first impression addressed in *Hart*: Where a defense attorney has available a key witness whose testimony is central to the defense *and* corroboration of that testimony, is it ineffective assistance of counsel to only introduce one part of the critical evidence to the jury but not the other? Although this issue of first impression was squarely presented and fully briefed to the Court of Appeals, the issue was ignored and the court did not even cite *Hart* let alone "meaningfully address" it.

In concluding that "[u]nder these circumstances, Hart's conviction cannot stand," 174 F.3d at 1073, the Ninth Circuit reasoned:

> "Given Jennifer's testimony that Hart never molested her when another adult accompanied Hart to the R-Ranch, the corroborative evidence in Kendall's possession *would have raised substantial doubt regarding Hart's guilt* of the specific

> charges in the information. In fact, had Kendall's receipts and records been presented to the jury, *it is highly doubtful that a reasonable juror could have voted to convict on those charges.*"

Hart v. Gomez, 174 F.3d at 1068-69 (emph. ad.).

Accordingly, the Ninth Circuit ruled that Hart's defense counsel was deficient in failing to investigate and present the important evidence to the jury and the deficiency prejudiced Hart's right to a fair trial. As to the deficient performance of defense trial counsel, the court held:

> "[I]t is simply inconceivable that [the attorney's] decision not to introduce documentary evidence fully corroborating Kendall's testimony was a strategic one."

Hart v. Gomez, 174 F.3d at 1070-71.

The Court of Appeals below did purport to address the question of whether it was "conceivable" that Petitioner's trial counsel had a "legitimate" tactical explanation for his prejudicial inaction when the record clearly shows he did not.[4] The appellate court speculates that it is "conceivable that counsel reasonably determined that D.C. would not present as credible." Slip op. at 9 But the court fails to recognize that "conceivable" in this context does not mean whatever a creative judge might imagine but instead is tethered to the standard of *what would a reasonable defense counsel do* in the context of all the evidence in the record and the necessity to call a particular witness in order to establish

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[4] Slip op. at 8-9 ("a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" quoting *State v. Grier,* 171 Wn.2d 17, 33 (2011), quoting *State v. Reichenbach,* 153 Wn.2d 126, 130 (2004).

reasonable doubt. Judge Reinhardt answered that question in *Hart* in the only realistic way it could be but the Court of Appeals chose not to listen.

Every trial lawyer knows there is no such thing as a perfect witfect witness and every witness' credibility is at issue while testifying. This cannot be the "conceivable" standard. And, the Court of Appeals fails to appreciate the basic calculus a defense counsel must engage in: even where the defense witness will be impeached, if her evidence is of overwhelming value to the defense and unavailable otherwise, she must be called to the stand – no reasonable defense lawyer would fail to do so. *Hart* To fail to do so is not a legitimate tactic or strategy – it is an abdication of the duty of zealous representation to the client, a violation of the 6th Amendment and a denial of a fair trial.

As to prejudice, the Ninth Circuit ruled that because the improperly omitted corroborating evidence was so "important to Hart's defense," 174 F.3d at 1071, "if the jury believed Kendall it could not have found Hart guilty beyond a reasonable doubt ... or at the least there is a reasonable probability that its verdict would have been different." Thus, defense counsel's "failure was prejudicial." 174 F.3d at 1073.

On the same reasoning, if key witness Desirae had testified, but for the deficient performance of trial counsel, and if the jury believed her in conjunction with the corroborating evidence presented through the testimony of other defense witnesses that she was always present at the apartment whenever N visited, "it could not have found [him] guilty beyond a

reasonable doubt ... or at the least there is a reasonable probability that its verdict would have been different." *Id.*

C. THE FAILURE OF DEFENSE COUNSEL TO CALL THE KEY WITNESS TO TESTIFY AT TRIAL, WHICH ACCORDING TO THE COURT OF APPEALS WAIVED APPELLATE REVIEW OF THE RULING ALLOWING IMPEACHMENT BASED ON PENDING BUT UN-PROVEN CHARGES, CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

On the authority of *State v. Kimp,* 87 Wn.App. 281 (1997)[5] and the failure of defense counsel to call Desirae to testify at trial, the Court of Appeals held that any error in allowing the state to impeach Desirae using multiple charged but unproven crimes was not preserved:

> "We hold that because D.C. did not testify, the trial court's ruling is not reviewable." Slip op. at 3

The court ignored the issue inevitably flowing from its decision: Did the failure of defense counsel to preserve error by not calling the witness to testify at trial constitute ineffective assistance of counsel? Although Petitioner pointed out to the court "if *Kimp* is read to bar review for failure of defense counsel to call the witness subject to ER608 impeachment, this would be an independent ground for finding ineffective assistance of counsel," App. Brf. at 14, n.4, the court was oblivious to the obvious outcome of its ruling denying review for counsel's error.

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5 *Kimp* has never been approved on the merits by this Court. Petitioner in the Court of Appeals argued preservation of erroneous ER 608(b) rulings where the witness does not testify but where the testimony is in the record is controlled by *State v. Ray,* 116 Wn.2d 531 (1991) not *Kimp.* Alternatively, Petitioner argued that *Kimp* was wrongly decided and harmful and should be overruled. App. Brf. at 14, n.4; Reply Brf. at 9-11. The Court of Appeals ignored the latter issue.

Since statehood this Court has recognized the fundamental unfairness to a criminal defendant of allowing impeachment based on alleged criminal acts in the absence of criminal conviction. *E.g., State v. Thomas* 14 Wash. 285 (1896)(reversal of rape conviction where trial court allowed impeachment by evidence of uncharged sexual misconduct). This basic principle of inadmissibility grounded on fundamental fairness has continued since the adoption of ER608. *E.g., State v. Roberts,* 25 Wn.App. 830, 837-38 (1980)(rape conviction reversed because a "witness should not be discredited except by those misdeeds for which he has been convicted.").

It is inconceivable that a reasonable defense attorney would fail to preserve patent error by simply calling the key witness to testify. At best, the defendant would be acquitted. At worst, the trial court error would be preserved for appeal and provide grounds for reversal in the event of conviction. It is also error for the court below on the one hand to deny review based on the deficient and prejudicial performance of counsel in failing to preserve the critical issue under Division I case law and on the other utterly fail to remedy the 6th Amendment violation resulting from its ruling.

F. CONCLUSION

Desirae Clough was the only percipient witness personally present with the complainant and Petitioner during the charging period. Her presence was corroborated by two witnesses. Her anticipated testimony

denying the complainant's charges was obtained by the police investigator and the trial prosecutor and is in the record. The testimony is highly favorable and central to the defense since Petitioner did not testify. The prosecutor acknowledged to the trial court that Desirae was the key defense witness and that her testimony alone could establish reasonable doubt. Defense counsel listed Desirae as a trial witness and represented to the court during trial that he would call her as a as a witness for the defense. He did not. The record shows the absence of any legitimate tactical or strategic basis for counsel's failure. No reasonable defense lawyer would have failed to call the key witness to the stand. In consequence of the 6th Amendment violation, Petitioner was denied a fair trial.

Petitioner requests review by this Honorable Court, reversal of his Judgment and Sentence and an order for new trial.

Dated this 18th day of October, 2023.

The undersigned certify pursuant to RAP 18.17 that this Petition contains, according to word processing software count, 4,987 words, excluding exempted parts.

Respectfully submitted:

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FILED
10/2/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT R D CALLIOUX, Appellant.	No. 84763-5-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Robert Callioux appeals his convictions of one count of rape of a child in the first degree and two counts of child molestation in the first degree for abusing his daughter, M.R.Y. He argues the trial court committed evidentiary error and deprived him of his right to present a defense by ruling *in limine* that the State could cross-examine one of Callioux's potential witnesses, D.C., about specific instances of dishonesty if she were to testify. He also argues that his trial counsel was ineffective for not calling D.C. to testify.

Because D.C. did not testify, Callioux's claim of evidentiary error is not reviewable. Also, Callioux fails to establish that the trial court's *in limine* ruling deprived him of his right to present his defense or that his trial counsel's performance was deficient. Accordingly, we affirm.

FACTS

In July 2019, M.R.Y., who was then 16 years old, disclosed that her father, Callioux, had sexually abused her when she was a child. M.R.Y. later testified

APPENDIX A

that the abuse began when she was four or five years old and stopped when she was about nine-and-a-half years old. M.R.Y., who resided primarily with her mother, recalled that the abuse would occur at night in Callioux's bedroom during M.R.Y.'s alternating weekend visitations to Callioux's apartment.

The State charged Callioux with one count of rape of a child in the first degree and two counts of child molestation in the first degree. It later moved *in limine* to cross-examine one of Callioux's potential witnesses, D.C., about specific instances of dishonesty, which were the subject of pending charges for theft, false statements, and false reporting, if D.C. were to testify. According to the State's motion, D.C., who is M.R.Y.'s cousin and Callioux's niece, "purport[ed] to have been at [Callioux's] home *every weekend* [M.R.Y.] was there" and "state[d] that because she was present every weekend [M.R.Y.] was present that [Callioux] could not possibly have sexually abused [M.R.Y.]" It asserted that D.C.'s credibility was "important and at issue," that the State should be allowed to cross-examine her "about her instances of dishonesty pending currently in the courts," and that those instances were "highly relevant . . . and more probative than prejudicial."

Callioux objected, arguing through counsel that "on pending cases that have not been adjudicated, we would suggest that they're not appropriate for specific instances and use by the State." The trial court disagreed and granted the State's motion, stating, "I think these are examples of instances of evidence that would fall under [ER] 608."

At trial, Callioux did not call D.C. to testify. M.R.Y. testified that although her cousins would come over to Callioux's apartment occasionally during the years that he was abusing her, they did not come over every weekend that she visited Callioux. Meanwhile, one of Callioux's sisters testified that she could verify that M.R.Y. was never alone with Callioux during any of the times M.R.Y. visited him. Another of his sisters—D.C.'s mother—testified that D.C. was with M.R.Y. every weekend, including overnights, that M.R.Y. visited Callioux.

The jury found Callioux guilty as charged. Callioux appeals.

ANALYSIS

ER 608 Ruling

ER 608 provides, as relevant here, that specific instances of a witness's conduct "may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness." ER 608(b). ER 608 is subject to the overriding protections of ER 403, which gives the trial court discretion to exclude evidence if its probative value is outweighed by the danger of unfair prejudice. State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). Callioux contends that the trial court abused its discretion by ruling that if D.C. testified, the State could cross-examine her about her pending criminal charges for theft, false statements, and false reporting. We hold that because D.C. did not testify, the trial court's ruling is not reviewable.

State v. Kimp, 87 Wn. App. 281, 941 P.2d 714 (1997), is instructive. In Kimp, the State moved under ER 608(b) to cross-examine a witness—there, the

defendant—about her alleged unauthorized use of a credit card if she testified. 87 Wn. App. at 282. The trial court ruled *in limine* that the prosecutor could question the defendant about whether she told the police about the incident, wherein she allegedly took her supervisor's credit card without permission and used it in several stores, signing her supervisor's name. Id. The defendant stated that she was not going to testify because of the trial court's ruling. Id. She also made an offer of proof claiming that she would have testified, with regard to the assaults that were the subject of her trial, that she did not hit one of the victims and that she struck the other in self defense. Id. at 282-83.

The defendant was convicted of assault, and on appeal, she challenged the trial court's ER 608 ruling. Id. at 283. We held that because the defendant did not testify, the trial court's ruling was not reviewable. Id. at 284-85. We observed that, as noted above, "in order to admit ER 608 evidence, the court must balance the probative value of the conduct against the danger of undue prejudice." Id. at 284. And "[t]o evaluate the danger of undue prejudice posed by prior misconduct evidence, the trial court needs to consider the substance of the witness' testimony." Id. "Similarly, to evaluate the trial court's decision, the appellate court needs to review both the witness' testimony and the impeaching evidence," and "there cannot be any meaningful review of a[n] ER 608(b) claim unless the witness has testified." Id. We noted, additionally, that "the failure of the defendant to testify renders any harm flowing from the ruling totally speculative because it would be uncertain whether the impeaching evidence

would even be offered." Id. (citing Luce v. United States, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)).

Here, as in Kimp, the fact that D.C. did not testify renders any harm flowing from the trial court's *in limine* ruling entirely speculative. Without D.C.'s testimony, we cannot know how her cross-examination would have played out. For example, and as the parties' disagreement on this point highlights, the record is unclear about whether the State intended to ask D.C. whether she had been charged with certain offenses, as distinct from inquiring about the underlying conduct. To this end, the State suggested below that the precise nature of its cross-examination could be discussed at a later time "in terms of what's appropriate and doesn't make it more prejudicial than necessary." It is entirely possible that, depending on the State's actual line of questioning, Callioux would have renewed his objection and the trial court would have revised its ruling or directed the State to ask only specific questions after balancing the probative value of D.C.'s alleged conduct against the potential for unfair prejudice. Cf. Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 466, 232 P.3d 591 (2010) (observing that motions *in limine* "often are tentative and subject to change at trial"). It is also possible that the State would elect not to question D.C. about her pending charges and instead rely solely on two prior theft convictions, which Callioux agreed were admissible, to call D.C.'s credibility into question. As in Kimp, we cannot meaningfully evaluate the trial court's ruling in view of D.C.'s actual testimony. Thus, as in Kimp, we do not review Callioux's claim of evidentiary error.

Callioux contends Kimp was wrongly decided because it failed to consider State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991). Ray involved a trial court ruling excluding exculpatory evidence. 116 Wn.2d at 543. Under ER 103(a)(2), to preserve error predicated on such a ruling, "the substance of the evidence [must be] made known to the court by offer or [be] apparent from the context within which questions were asked." The Ray court held that although the defendant did not make a formal offer of proof about the witness's anticipated testimony, no formal offer was necessary "because the colloquy of the parties and the court, on the record, revealed the substance of the proposed testimony." 116 Wn.2d at 539. Callioux argues that similarly, here, D.C.'s testimony that she was at Callioux's home each weekend that M.R.Y. was there "was known to both parties, and to the trial court to a degree sufficient to allow review."

But Callioux focuses on the wrong aspect of D.C.'s would-be testimony. The trial court here did not, as the trial court did in Ray, exclude any of D.C.'s anticipated *exculpatory* testimony. Instead, it ruled that if Callioux were to elicit that testimony, the State would be allowed to cross-examine D.C. about her character for truthfulness by asking her about specific instances of conduct. It is the unknown nature of that cross-examination—not of D.C.'s testimony about her presence at Callioux's home—that makes Callioux's claim of error unreviewable. Ray does not control.[1]

[1] In his reply brief, Callioux urges us to adopt the reasoning of a North Carolina case, State v. Lamb, wherein the trial court denied the defendant's motion in a murder trial to prevent the prosecutor from questioning her about her alleged involvement in other killings. 321 N.C. 633, 636, 365 S.E.2d 600 (1988). But the Lamb court "express[ed] no opinion" on whether the defendant's decision

Right to Presenta Defense

Callioux also argues that the trial court's ruling *in limine* deprived him of his right to present a defense. In support, Callioux relies on State v. Broussard, 25 Wn. App. 2d 781, 525 P.3d 615 (2023), State v. Chicas Carballo, 17 Wn. App. 2d 337, 486 P.3d 142 (2021), State v. Cox, 17 Wn. App. 2d 178, 484 P.3d 529 (2021), State v. Orn, 197 Wn.2d 343, 482 P.3d 913 (2021), State v. Cayetano-Jaimes, 190 Wn. App. 286, 359 P.3d 919 (2015), and State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). But each of these cases involved a ruling that excluded or prevented the defense from eliciting certain testimony. See Broussard, 25 Wn. App. 2d at 785; Chicas Carballo, 17 Wn. App. 2d 345; Cox, 17 Wn. App. 2d at 185; Orn, 197 Wn.2d at 351-52; Cayetano-Jaimes, 190 Wn. App. at 303-04; Jones, 168 Wn.2d at 717-18. Here, by contrast, the trial court's ruling did not exclude any of D.C.'s testimony or prevent Callioux from eliciting that D.C. was with M.R.Y. every weekend that M.R.Y. was with Callioux. As much as Callioux urges us to treat the trial court's ruling here as a "constructive" exclusion of D.C.'s testimony, it was not. Cf. Cayetano-Jaimes, 190 Wn. App. at 302, 304 (characterizing as exclusionary the denial of a motion to allow

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not to testify rendered the trial court's ruling unreviewable, instead granting the defendant a new trial where it was "abundantly clear from the record . . . that defendant intended to testify unless her motion *in limine* was denied" and the evidence at issue was inadmissible under ER 608(b) because it "show[ed] specific instances of conduct relating to violence against other persons" and, thus, was "irrelevant to defendant's veracity." Lamb, 321 N.C. at 646-48. Here, Callioux does not point to anything in the record to show that D.C. would have testified if not for the trial court's ruling, and it is undisputed that D.C.'s at-issue conduct was probative of her veracity. Not only is Lamb not binding, it is readily distinguishable.

telephonic testimony where there was no dispute about the witness's unavailability to appear in court). Callioux fails to show that the trial court's ruling deprived him of his right to present a defense.

Ineffective Assistance of Counsel

Finally, Callioux argues that his trial counsel was ineffective. We disagree.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on a claim of ineffective assistance, a defendant must establish that (1) his attorney's performance was deficient and (2) the deficiency prejudiced him. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end our inquiry." State v. Johnson, 12 Wn. App. 2d 201, 210, 460 P.3d 1091 (2020).

Here, Callioux argues that his trial counsel was ineffective for not calling D.C. as a witness. "To prevail on an ineffective assistance claim, a 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 Kyllo, 166 Wn.2d at 862). "A decision not to call a witness is a matter of trial tactics that generally will not support a claim of ineffective assistance of counsel." State v. Krause, 82 Wn. App. 688, 697-98, 919 P.2d 123 (1996). But "a criminal defendant can rebut the presumption of reasonable performance by

demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.' " Grier, 171 Wn.2d at 33 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Callioux does not rebut the presumption that counsel's decision not to call D.C. as a witness was a reasonable one. As Callioux himself acknowledges, the record does not reveal why defense counsel did not call D.C. to the stand. And "we will not presume deficient performance from a silent record." State v. Heng, 22 Wn. App. 2d 717, 744, 512 P.3d 942 (2022), review granted in part, 200 Wn.2d 1025 (2023). Although Callioux asserts that "[t]here was no downside to presenting [D.C.'s] testimony," we cannot know that from this record. As the State points out, it is conceivable that counsel reasonably determined that D.C. would not present as credible. It is also conceivable that defense counsel had reason to believe D.C.'s recollection about her weekends with M.R.Y. was not as unwavering as Callioux represents it would have been.[2] In either case, it is further conceivable that defense counsel reasonably believed putting D.C. on the stand would undermine D.C.'s mother's and aunt's testimony in that regard. On this record, Callioux does not rule out conceivable tactical reasons to explain counsel's decision. Consequently, his ineffective assistance claim fails. Cf. State v. Linville, 191 Wn.2d 513, 525, 423 P.3d 842 (2018) (ineffective assistance claim failed where record was silent as to counsel's reasons for not

[2] We note that the record does not include a sworn statement or testimony from D.C., and that according to the certification of probable cause, D.C. stated during her interview that "she would *pretty much* spend the night with [M.R.Y.] *almost* every other weekend when [M.R.Y.] was with [Callioux]." (Emphasis added.)

objecting and, thus, it was impossible to tell whether any hypothesis as to counsel's reasons was correct).

Callioux cites a number of cases in support of reversal but they each involved counsel's *uninformed* decision not to call a witness or, in one case, a decision that was unreasonable because it was based on an actual conflict of interest. See State v. Jones, 183 Wn.2d 327, 345, 352 P.3d 776 (2015) (counsel failed to interview clearly identified and accessible witnesses); State v. Robinson, 79 Wn. App. 386, 399, 902 P.2d 652 (1995) (counsel decided not to call a witness, whom he also represented, due to an actual conflict of interest); State v. Thomas, 109 Wn.2d 222, 230-31, 743 P.2d 816 (1987) (counsel failed to investigate his own expert's qualifications, which investigation would have revealed were lacking); State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (counsel failed to interview a witness); State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978) (counsel "made virtually no factual investigation" and "admit[ted] he was unprepared for trial"). Callioux does not show that counsel's decision not to call D.C. was uninformed or the result of a conflict of interest.

We affirm.

Smith, C.J.

WE CONCUR:

Díaz, J.

Bjorgen, J.

IN THE COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT R.D. CALLIOUX,

Petitioner.

No. 84763-5-I

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
ss.
COUNTY OF SNOHOMISH)

The undersigned states that on October 18, 2023 he electronically served via the Washington Appellate Courts Web Portal a copy of Petitioner's Petition for Discretionary Review of Decision of Court of Appeals Terminating Review, addressed to Deputy King County Prosecutor, King County Prosecutor's Office, King County Courthouse, 516 3rd Avenue, Room W554, Seattle, Washington, 98104.

The undersigned also states that on October 18, 2023, he mailed to Petitioner Robert Callioux (DOC No. 434822) via U.S. Mail a physical copy of the Petition for Discretionary Review of Decision of Court of Appeals Terminating Review, to Stafford Creek Corrections Center, H232U, 191 Constantine Way, Aberdeen, Washington 98520.

I certify under penalty of perjury under the laws of the State of Washington that the above is true and correct.

DATED THIS 18th DAY OF OCTOBER, 2023.

DEREK T. CONOM, WSBA #36781

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The previous filing of the Petition for Discretionary Review inadvertently omitted Appendix A to the Petition. This filing corrects that and includes Appendix A to the Petition.

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The previous filing of the Petition for Discretionary Review inadvertently omitted Appendix A to the Petition. This filing corrects that and includes Appendix A to the Petition.

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