NO. 92637-9
COA NO. 46216-8-II
Cowlitz Co. Cause NO. 12-1-01146-7

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD HOWARD MCELFISH,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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HALL OF JUSTICE
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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the October 20, 2015, unpublished opinion of the Court of Appeals in *State v. McElfish*, COA No. 46216-8-II. This decision upheld the petitioner's convictions of attempted second degree rape, first degree kidnapping, and second degree assault with sexual motivation.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that sufficient evidence supported McElfish's convictions, that there was no prosecutorial misconduct, that McElfish received effective assistance of counsel, and that the prosecution did not improperly vouch for the credibility of witnesses.

III. STATEMENT OF THE CASE

McElfish was charged with attempted first degree rape, first degree kidnapping, second degree assault with sexual motivation, and indecent liberties based on his involvement in an incident wherein CM was forced at gun-point to take her clothes off and was duct-taped to a chair. Brandt Jensen told CM that he, McElfish, and a third man were all going to have sex with her in retribution for her stealing a possession of Jensen's. Jensen and the other man left McElfish with CM. McElfish then grabbed her

breast, tried to touch her vagina, and blocked her from leaving. She begged him to leave her alone, but he persisted in his advances. She was eventually able to escape and run to a neighboring home where she received aid.

The jury found McElfish guilty of all the charges except indecent liberties. McElfish appealed and his appeal was denied, except that the trial court did not conduct findings that McElfish was able to pay his legal financial obligations. He now raises the same issues in this petition for review as he raised in his pro se statement of additional grounds.

IV. ARGUMENT

THE COURT OF APPEALS PROPERLY HELD THAT SUFFICIENT EVIDENCE SUPPORTED MCELFISH'S CONVICTIONS FOR KIDNAPPING AND ATTEMPTED RAPE, THAT THERE WAS NO PROSECUTORIAL MISCONDUCT, THAT MCELFISH RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, AND THAT THE PROSECUTION DID NOT IMPROPERLY VOUCH FOR THE CREDIBILITY OF WITNESSES; THEREFORE, THE CONVICTIONS SHOULD BE UPHELD AND THE PETITION FOR REVIEW SHOULD NOT BE GRANTED.

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of

Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division II Court of Appeals holding in this case is not in conflict with any decisions either the Washington Supreme Court or another division of the Court Appeals. The holding also does not raise a significant question of law or involve an issue of substantial public interest.

A. Insufficiency of evidence.

The standard of review for a claim of insufficient evidence is, after viewing the evidence in the light most favorable to the State, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 1171 (Div. II 2005); *State v. Camarilla*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court will not review credibility determinations). Finally, circumstantial evidence is considered no less reliable than direct evidence. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991).

CM testified that after Jensen left, McElfish grabbed her breast and tried to touch her vagina, then blocked her from leaving. Only after he opened a door to yell for Jensen to help him was she able to escape out a different door. This evidence supports the elements of the charges McElfish was convicted of because it shows he assaulted CM with sexual motivation, took a substantial step toward raping her, and prevented her from leaving. No third-party eyewitness testimony is required, nor is DNA evidence required. Taken in the light most favorable to the State, a rational trier of fact could have found McElfish guilty. There is no significant question of law or public interest here, and the petition should be denied.

B. There was no prosecutorial misconduct.

McElfish first argues that the prosecutor committed misconduct by commenting on his failure to testify. The only statement the prosecutor made regarding McElfish's testimony mirrored Jury Instruction 6. The prosecutor stated, "Now, you cannot hold the defendant not testifying against him. Don't do that. It's the State's job to prove the case." RP at 57. Therefore, the prosecutor did not comment on McElfish's failure to testify or argue in any way that such a failure was indicative of guilt.

McElfish then argues that the prosecutor committed misconduct by comparing the burden of proof to a cake. While it is true that a prosecutor can commit misconduct by trivializing the burden of proof, that is not what

happened here. The prosecutor was describing the contributors of DNA found on a piece of evidence, not discussing the burden of proof at all. The prosecutor explained that the five possible DNA contributors were jumbled together and could not be separated out by the analyst, just like when a cake is baked and then a person cannot separate out the ingredients.

Finally, there was no cumulative error or cumulative misconduct in this case, and McElfish cannot show prejudice. Therefore, there was no prosecutorial misconduct and the petition should be denied.

C. McElfish received effective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the

challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: "After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978), *citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer "failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* Therefore, even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice.

McElfish argues that his counsel was ineffective for failing to call a witness, Ronald Heasley. However, McElfish does not explain what testimony Heasley would have been able to contribute, besides saying

Heasley was at the house on the date of the incident. This Court therefore should not consider this possible claim. Further, CM testified that she and McElfish were the only people in the room when the crimes occurred, so any testimony by Heasley would not, to any degree of certainty, have changed the outcome of the trial. Therefore, trial counsel was not ineffective and the petition should be denied.

D. The prosecution did not improperly vouch for the credibility of a witness.

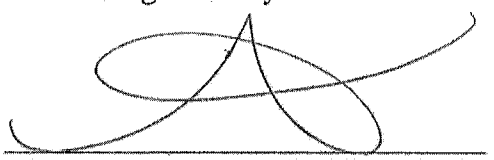
It is misconduct for a prosecutor personally vouches for the credibility of a witness. *State v. Thorgerson*, 172 Wn.2d 438, 462, 258 P.3d 43 (2011). This generally occurs if the prosecutor express his or her personal beliefs about a witness. *Id.* However, prosecutors do have wide latitude to argue reasonable inferences from the evidence. In this case, the prosecutor argued that certain witnesses may have bias or memory issues, based on testimony that was presented at trial. The prosecutor did not express her personal beliefs about any witness, but rather argued reasonable inferences regarding possible bias. A prosecutor is not required to impeach a witness's testimony on the stand in order to argue these types of inferences in closing argument. There was no misconduct in this case and the petition should be denied.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 9th day of February, 2016.

RYAN JURVAKAINEN
Prosecuting Attorney

By: 

AILA R. WALLACE/WSBA #46898
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

Supreme Court
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Olympia, WA 98504
supreme@courts.wa.gov

and, sent to the Appellant by US Mail to:

DONALD HOWARD MCELFISH
DOC # 239025
Coyote Ridge Correctional Center
P.O. Box 769
Connell, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 10th, 2016.

Michelle Sasser
Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle
Subject: RE: PAs Office Scanned Item Donald Howard McElfish, 92637-9

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Attached, please find the Response to Petition for Review regarding the above-named Petitioner with Certificate of Service.

If you have any questions, please contact this office.

Thanks, Michelle Sasser

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
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