NO. 46119-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

CHARLES R. GOTCHER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

The State agrees with the appellant's statement of the case with one exception. There is a claim that the appellant was not present at the off-the-record choosing of the blind alternates. This is incorrect. The appellant was present with counsel when this occurred.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. Did the procedure employed for selecting alternate jurors violate the defendant's right to a public trial?

No. There was no closure when counsel each named their own number to become an alternate juror.

The State agrees with the legal authority provided by the appellant; however, this case can be distinguished from *State v. Jones*, 175 Wn.App. 87, 303 P.3d 1084 (2013). The record is insufficient to show that the actual procedure used to select the alternate jurors was a closure. However, from the Clerk's minutes it can be correctly inferred that the State and the defense each selected a number of their preference to be an alternate. Unlike the trial in *State v. Jones*, there was no mechanism employed, such as a drawing, to select the jurors. The record reflects that the random selection was done by the parties' attorneys under the supervision of the judge. Participation by counsel is an additional

safeguard against manipulation and chicanery. Therefore, everything of import was presented on the record and in open court.

The announcement that "Mr. Strophy picked #10 and Ms. Svoboda picked number #8 in that order." Supp. CP. Is the sum total of what occurred in choosing the jurors. Without entering the minds of counsel, there was nothing further that could have been presented to the public. So there was no closure of the proceedings.

B. Did the trial court abuse its discretion when it declined to impose an exceptional sentence downward from the standard range?

No. The sentence imposed was a proper exercise of the court's discretion.

As stated by the appellant, a defendant generally cannot appeal a standard range sentence such as the one imposed in the case at bar. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). The State further agrees that "[a] court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances..." *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997).

However, in the case at bar, there is no evidence that the court made such a categorical denial nor that the court "relied on an impermissible basis for refusing to impose an exceptional sentence below

the standard range." *State v. Garcia-Martinez* 88 Wn.App. 330. Other than a bare claim that such an impermissible denial occurred, there is nothing in the record to support this.

There is nothing to show that the court held it against the appellant that he exercised his constitutional right to a trial. However, once convicted the defendant is no longer presumed innocent and, for all purposes, he is guilty of the crime. The fact that he showed neither acceptance of his crimes nor any remorse is sufficient to decline to give the extraordinary grace of an exceptional sentence below the standard range. At sentencing, the appellant stood convicted of multiple sex offenses against a young girl that he plied with drugs and alcohol. It is certainly a proper exercise of the court's authority to impose a standard range sentence when no mitigation is present and the defendant does not even acknowledge his culpability.

C. Was evidence withheld from the defendant that was exculpatory in nature?

No. The information was not exculpatory, and the defendant had actual knowledge of the information at issue.

In a Personal Restraint Petition the appellant complains that evidence of another case that involved the same victim was not provided

by the State. He states that this information "could have helped to prove [his] innocence." However, he provides no facts or authority to support that bare contention. He also claims that this was "newly discovered" evidence, the facts are to the contrary.

In the original discovery to defense counsel, the State provided a 26 page transcript of a confrontation call that was conducted between the appellant and the victim. On pages 2-3, the victim says to the appellant, "You know about like the whole Jacob Gaiser thing, and everything." Attachment "A". The State was also present during the defense interview of the victim. At this interview, she was asked about Jacob Gaiser by defense counsel.

It is obvious that a young woman could be the victim of more than one assailant. The appellant offers no explanation why this information would be helpful to him in his case. These cases happened in geographically similar places, and the facts of one would not provide an alibi to the other.

Due process requires the State to disclose "evidence that is both favorable to the accused and 'material either to guilt or to punishment.' " *United States v. Bagley,* 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (quoting *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194,

10 L.Ed.2d 215 (1963)). There is no *Brady* violation, however, "if the defendant, using reasonable diligence, could have obtained the information" at issue. *In re Personal Restraint of Benn,* 134 Wash.2d 868, 916, 952 P.2d 116 (1998).

Moreover, evidence is "material" and therefore must be disclosed under *Brady* "only if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *United States v. Bagley,* 473 U.S. at 682, 105 S.Ct. 3375; *Benn,* 134 Wash.2d at 916, 952 P.2d 116. In applying this "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Benn,* 134 Wash.2d at 916, 952 P.2d 116. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of trial.' " *Id.* (quoting *Bagley,* 473 U.S. at 678, 105 S.Ct. 3375).

In this case, the defense has actual knowledge of the material now complained of. The State did not suppress any information. Assuming

arguendo that this material was not in the possession of the defense, it is neither exculpatory nor material in any way to his case.

III. CONCLUSION

For all the reasons above, the State respectfully asks that the appeal be denied on all grounds, and that the Court affirm the verdict of the jury and the sentence imposed by the trial court.

DATED this 18 day of May, 2015.

Respectfully Submitted,

KATHERINE L. SVOBODA
WSBA #34097

ATTACHMENT "A"

Charles Gotcher: So you're telling me that you told Brooklee nothing happened.

Aisha Eaton: Yeah. I've just been like 'No.' I've been trying to not talk to anybody. Like whenever they ask me and everything, I'm trying to not talk to anybody about us. Like Brooklee ended up calling Darryl and stuff, and that's why the schedules got switched and everything. I was like, 'Oh, I thought Charles was supposed to work today.' No, apparently you weren't going to working today—that day. And I don't know. I'm sorry that she did that and everything, and like, I don't know how to handle it.

Charles Gotcher: You know what?

Aisha Eaton: I don't know how to like end up talking everybody out of it, because they are not believing me.

Charles Gotcher: All you can do is keep sticking with, you know, that you're telling the truth and that nothing happened.

Aisha Eaton: Well, I keep doing that, but no matter what I say, it's just not working. They don't care if I say no. They're just like, 'We don't believe you. We don't believe you,' and everything, and they all really—they just like, they keep telling me that I'm lying.

Charles Gotcher: So you keep telling them that nothing happened.

Aisha Eaton: Yeah.

Charles Gotcher: And they just keep telling you that you're lying, and trying to pressure you into saying what they want you to.

Aisha Eaton: Yeah, exactly.

Charles Gotcher: Um, you're just going to have to keep sticking with it until it all goes away then.

Aisha Eaton: When will it all just fucking go away though?

Charles Gotcher: I don't know. Did you file a police report with them?

Aisha Eaton: No, I've been refusing. I'm just like, 'No. I don't want to talk about it. I don't want to do anything about this.' I don't like having to do with it. You know about like the whole Jacob Gaiser thing, and everything. And I had to go through all that then. Like, even if I was upset about everything, and like that I wanted

anything to happen to you, I still wouldn't do it, because I don't like that stuff. I don't like having to deal with that at all.

Charles Gotcher: Wait, and what do—what do they expect with-? I mean, you got Chris, Randy, Robby.

Aisha Eaton: Well, like there's nothing like with that. I don't even know. Like-

Charles Gotcher: So that'll all end up getting brought into it.

Aisha Eaton: Well, I don't know.

Charles Gotcher: So just let me get this straight one more time. You keep telling them that it's the truth, that nothing happened between me and you.

Aisha Eaton: Yeah.

Charles Gotcher: And they don't believe you, and they keep trying to pressure you into saying something.

Aisha Eaton: Yeah, and like it's really hard on me, because it's not my fault, and everything, and I want to make it all disappear. I want it to all go away and everything, but like with everything you did and like that were between us and everything, everything that happened with me, like I have no way to deal with it or anything. I'm going through so much that like, I'm seriously so close. I just really—I'm about—I really just want to fucking kill myself. I—*[Sobbing]*

Charles Gotcher: Don't kill yourself.

Aisha Eaton: Well, then like help me. Make the stress go away. Like, you've always been really good, like. Listen to me, you know my problems, you know how I feel and everything. You've always done everything for me. And you've always been my little problem solver and everything. So like, why can't—why is there no solution right now? I feel like there's nothing that I can do. I don't know.

Charles Gotcher: Hold on a minute. Just one sec. I'll be back.

Aisha Eaton: *[Sigh]*

Charles Gotcher: You still there?

Aisha Eaton: Yeah.

GRAYS HARBOR COUNTY PROSECUTOR

May 17, 2015 - 3:28 PM

Transmittal Letter

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