NO. 93470-3

IN THE SUPREME COURT OF F THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES ROWLEY,

Appellant.

PETITION FOR REVIEW OF COURT OF APPEALS DIVISION ONE DECISION FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay Judge

PETITION FOR REVIEW

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
P.O. BOX 2711
VASHON, WA 98070

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TABLE OF AUTHORITIES

A. IDENTITY OF MOVING PARTY

Petitioner JAMES ROWLEY through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Rowley requests review of the Court of Appeals July 25, 2016 ruling affirming his conviction under case number 9523-9-I. A copy of the decision is attached in the Appendix at pages 12-15.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred by ruling that Mr. Rowley failed to present legal authority or factual evidence in support of his argument that trial counsel was prejudicially ineffective for failing to object to testimony from his mother that implied he was a repeat child molester.

> Here, Rowley argues that there was no strategic reason to decline to object to that admission of either his mother's testimony or the child hearsay statements. He also argues that an ER 403 objection would have been sustained in both instances, and that the outcome of the trial would have been different without the inclusion of such prejudicial evidence. But he provides no factual or legal basis for these contentions.

Court of Appeals opinion at page 6.

2. The Court of Appeals erred by refusing to consider the applicable law and relevant facts presented in Appellant's opening brief in support of his argument that trial counsel was prejudicially ineffective for failing to object to testimony from his mother that implied he was a repeat child molester.

D. STATEMENT OF THE CASE

During trial, the complainant (A.R.) testified that during the night, in a room without a light, she saw a man under a blanket she said was Rowley. RP 402-06. A.R. testified that Rowley touched her private parts. RP 393. A.R.'s cousin Wyatt Tegman testified that he saw the silhouette of a man with spikey hair who he believed was Rowley. RP 138-149.

a. Child Hearsay.

The court permitted A.R.'s grandmother to repeat that A.R. said Rowley touched her. RP 17-0-71. Dr. Joseph Hoffman also testified that A.R. told him that Rowley touched her "bottom". RP 261-64. Sexual assault nurse Nancy Young also testified that Rowley touched her. RP 270.

Detective Paul Pittman conducted a child interview and testified to the same as recounted by A.R. RP 418-19.There was no physical evidence of molestation. RP 265, 275.

Without objection from trial counsel, Rowley's mother stated that she knew that Rowley was a repeat child molester. RP 180. **"I love my son. I don't like what he does, you know, but I also love my grandchildren. It was a mess."** RP 180 (emphasis added).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b) because the Court of Appeals decision is in conflict with decisions from the State Supreme Court and Division Two and the Court of Appeals failed to consider Mr. Rowley's argument that his trial attorney was ineffective for failing to object to Mr. Rowley's mother's inadmissible comments that she believed her son was a repeat child molester.

Mr. Rowley presented the following authority in support of his ineffective assistance of counsel arguments:

State v. *Hardy*,
133 Wn.2d 701, 946 P.2d 1175 (1997)

State v. Maynard,
183 Wn.2d 253, 351 P.3d 159 (2015

State v. Reichenbach,
153 Wn.2d 126, 101 P.3d 80 (2004)

State v. Saunders,
91 Wn.App. 575, 958 P.2d 364 (1988)

State v. Stith,
71 Wn.App. 14, 856 P.2d 415 (1993)

Padilla v. Kentucky,
559 U.S. 356, 130 S.Ct.1473, 176 L.Ed.2d 284 (2010)

Strickland v. Washington,
466 .S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

ER 403

Appellant's Opening Brief (incorporated by reference herein). Mr. Rowley set forth the relevant facts, "I love my son. I don't like what he does, you know, but I also love my grandchildren. It was a mess." RP 180.

The Court of Appeals decision ignoring this legal authority and these facts fits the criteria under RAP 13.4(b)(1)(2), (3).

RAP 13.4(b) provides in relevant part:

> (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 another decision of the Court of Appeals; or

> (2) If the decision of the Court of Appeals is in conflict with a published decision 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

Id.

The cases presented by appellate counsel provided conclusive legal authority for Mr. Rowley's argument that counsel rendered prejudicially ineffective assistance of counsel.

a. Ineffective Assistance.

To prove ineffective assistance of counsel, a defendant must show (1) that counsel's conduct fell below an objective standard of reasonableness; and (2) that this deficient conduct resulted in prejudice to the defendant—that there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would be different. *Strickland v. Washington*, 466 .S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Maynard*, 183 Wn.2d 253, 260, 351 P.3d 159 (2015). "Although courts strongly presume that defense counsel's conduct was not deficient, a defendant rebuts this presumption when no conceivable legitimate tactic exists to explain counsel's performance." *State v. Reichenbach*,

153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Strickland recognized the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense" entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence. *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct.1473, 176 L.Ed.2d 284 (2010) (quoting *Strickland,* 466 U.S. at 688, 694); accord, *State v. Henderson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Under *Strickland,* "strategic choices" "are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Hinton,* 134 S.Ct. at 1088 (failure to request funds for adequate expert prejudicial ineffective assistance of counsel) (*quoting Strickland*, 466 U.S. at 690-91).

b. Counsel Was Prejudicially Ineffective For Failing to Move to Strike and Request A Curative Instruction When Rowley's Mother Inferred He Was a Repeat Child Molester.

When a defendant claims his lawyer ineffectively assisted him by introducing or failing to object to evidence, "the defendant must show (1) an absence of legitimate strategic or tactical reasons

supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted." *Saunders,* 91 Wn.App. at 578.

This Court recognizes that there is no tactical reason for failing to move to suppress inadmissible evidence. *State v. Reichenbach*, 153 Wn.2d 126, 130, 137, 101 P.3d 80 (2004). In *Reichenbach*, the Court reversed a conviction and remanded for a new trial where counsel failed to move to suppress methamphetamine illegally seized. *Reichenbach*, 153 Wn.2d at 137. This Court held that counsel's deficient performance was prejudicial because there was no legitimate tactical reason for failing to move to suppress and without that evidence, the State could not prove possession beyond a reasonable doubt. Id.

Here *Reichenbach* applies even though the legal basis for the motion to suppress differed because in both cases counsel was prejudicially deficient for failing to move to suppress where the motion would have been granted and the outcome differed. *Reichenbach*, 153 Wn.2d at 130, 137.

Saunders, a Division Two case applies as well. Division Two

reversed Saunders' conviction based on ineffective assistance counsel for failing to object to inadmissible hearsay regarding related drug offenses. Division Two held that there was no tactical reason to fail to object, the court would have granted a motion to suppress and the prejudice was undeniable. *Saunders,* 91 Wn.App. at 580-81, (*citing, Strickland*, 466 U.S. at 694; State v. *Hardy*, 133 Wn.2d 701, 712-13, 946 P.2d 1175 (1997); *State v. Stith*, 71 Wn.App. 14, 22-23, 856 P.2d 415 (1993)(the prosecutor informed the jury that Stith was out dealing drugs again, was inadmissible and prejudicial requiring reversal).

Here, the defendant's own mother, made the offending remarks inferring that Rowley was a known child molester. The trial court would have stricken the offending comments and provided a curative instruction because there was no possible strategic reason not to object to highly prejudicial inadmissible evidence that Rowley's own mother thought he was a repeat child molester.

The evidence would not have been admissible under the cases cited herein or under ER 404(b) or 403 because the evidence was impermissible propensity evidence which is forbidden. Also as indicated by the cases and legal rules cited

herein, the mother's comments were unduly prejudicial. *Reichenbach*, 153 Wn.2d at 137; *Saunders,* 91 Wn.App. at 580; *Stith*, 71 Wn.App. at 22-23; ER 404(b), ER 403.

And as in these cases, the result of the trial likely would have differed without the evidence because the mother's comments were a direct admission that Mr. Rowley was a child molester. This evidence was propensity evidence akin to a prior conviction which is the most prejudicial when, as in this case, it is identical to the charge being tried. *Saunders,* 91 Wn.App. at 580.

This Court should accept review under RAP 13.4(b)(1),(2) because the Court of Appeals opinion is in conflict with *Saunders Stith* and *Reichenbach.* This Court should also accept review because the Court of Appeals refusal to consider the law and facts presented on direct appeal is a fits the criteria RAP 13.4(b)(3) as a significant question of law under the Constitution of the State of Washington or of the United States is involved.

F. CONCLUSION

For the reasons stated herein and in the referenced opening brief on appeal, this Court should accept review under RAP 13.3(b)(2), (3).

DATED THIS 12th day of August, 2016.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER

LISE ELLNER, WSBA 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served Mason County Prosecutor Appeals timw@co.mason.wa.us and James Rowley/DOC#982733 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, On August 12, 2016. Service was made electronically to the prosecutor and via U.S. Postal to Mr. Rowley.

Signature

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES CURTIS ROWLEY, Appellant.	)	No. 75239-1-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: July 25, 2016

SPEARMAN, J. — James Rowley appeals his conviction for child molestation in the first degree. He argues that the trial court, on retrial, erred in denying his motion to exclude child hearsay statements and adopting the prior court's evidentiary ruling. He also argues that he was denied effective assistance of counsel because his attorney failed to raise an ER 403 objection to the hearsay statements and to other evidence introduced at trial. Finding no error, we affirm.

FACTS

This appeal follows Rowley's second trial, which, in turn, follows our reversal of his 2008 conviction for first degree child molestation. In re Personal Restraint of Rowley, noted at 179 Wn. App. 1055, 2014 WL 954256. Rowley filed a personal restraint petition, arguing that his appellate counsel was ineffective for failing to raise his public trial rights on appeal. Id. We found that he was entitled

to collateral relief and remanded for a new trial. Id. Following a second trial, the jury convicted Rowley of child molestation in the first degree.

The charges against Rowley arose from an incident in 2008. The victim, A.K.R., was nine years old at the time of the incident. Immediately after the incident occurred, A.K.R. told her parents and her grandmother what had happened. She also made statements to investigators and other witnesses.

Before Rowley's first trial, the trial court held a child hearsay hearing and determined that A.K.R.'s hearsay statements were admissible because they complied with RCW 9A.44.120. Neither Rowley's direct appeal nor personal restraint petition challenged this ruling. On remand, Rowley objected to the admission of a videotaped interview of A.K.R. by Detective Shellee Stratton. Rowley's counsel requested a new child hearsay hearing. The court viewed the video and heard argument on its admissibility. The trial court declined to hold a new hearing, concluding that "having another hearing is somewhat of a moot point because the child is no longer a child and we have the actual . . . hearing done back in 2008." Verbatim Report of Proceedings (VRP) at 250.

Rowley's mother, Kay Stewart, also testified at trial. On cross-examination she stated that "I love my son. I don't like what he does, you know, but I also love my grandchildren." VRP at 180. The jury found Rowley guilty of child molestation in the first degree. He was again sentenced to life without the possibility of early release. He appeals.

DISCUSSION

Rowley first argues that the trial court erred by admitting A.K.R.'s videotaped interview. He contends that because his case was remanded for a new trial, the trial court was required to hold a new hearing on the admissibility of the video. According to him, the trial court was to "start with a clean slate" and provide a "new trial" that was not a "second trial with remnants from the first trial."[1] Br. of Appellant at 10-11. The State points out that the order for a new trial was because Rowley received ineffective assistance from his appellate counsel, who failed to raise the public trial issue on direct appeal. The State argues that because the propriety of the trial court's ruling admitting the video was neither challenged nor addressed during appellate review, the court was not required to hold a new hearing on the issue. We agree with the State.

State v. Mannhalt, 68 Wn. App. 757, 845 P.2d 1023 (1992) is instructive. In that case, Mannhalt was convicted of several felony offenses. After his direct appeals were unsuccessful, Mannhalt sought relief in federal court, which granted him a writ of habeas corpus, solely on the ground that a state's witness in the trial accused Mannhalt's attorney of crimes related to those alleged against Mannhalt. On remand, the trial court denied Mannhalt's request to relitigate a motion to suppress physical evidence that had been denied at his first trial. The court stated:

[1]Rowley argues that all rulings from the first trial should be vacated because the conviction was reversed for ineffective assistance by both trial and appellate counsel. This is not correct. Rowley did not raise any issues with trial counsel's performance in his personal restraint petition and this court found appellate counsel only had rendered ineffective assistance.

> I simply see no point in relitigation of the thing. If I felt it was incompetently done or something like that, I would grant it, but I think we would be simply going through an exercise without any particular point to it.

Id. at 762. The court concluded that the prior ruling "was res judicata as to the second trial." Id. at 760.

After the second trial, Mannhalt was again convicted. On appeal, he argued among other things, the trial court's refusal to hold a new suppression hearing. He contended, as Rowley does here, that "a federal writ of habeas corpus nullifies the conviction and the entire trial, requiring a de novo relitigation of all the issues in the case." Id. at 763. Also like Rowley, Mannhalt "offer[ed] no cases directly supporting this proposition, and we have found none." Id. Accordingly, the court looked to the federal court order itself to determine the intended effect of the habeas corpus writ on the original suppression hearing and found no indication that relitigation of the suppression issue was warranted.

Similarly, in this case we look to the opinion of this court which granted Rowley relief pursuant to his personal restraint petition. There, Rowley alleged only that "his appellate counsel was ineffective for failing to raise the public trial issue on direct appeal." Rowley, 2014 WL 954256 at *1. We found the claim had merit and remanded for a new trial. We find no indication in our ruling that other matters occurring at the trial were erroneously decided or incompetently done. We conclude that the trial court did not err in refusing to relitigate the admissibility of the videotape of A.K.R.'s interview.

Rowley next argues that his counsel's performance in his second trial was deficient based on the failure to raise an ER 403 objection to the child hearsay evidence. He also argues that he received ineffective assistance because his attorney failed to challenge the admission of his mother's testimony that "impl[ied] he was a repeat child molester." Br. of Appellant at 18.

Ineffective assistance of counsel is a fact-based determination and we review the entire record in determining whether a defendant received effective representation at trial. State v. Carson, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015) (citing State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). In order to prove ineffective assistance, a defendant must show (1) that counsel's conduct fell below an objective standard of reasonableness; and (2) that this deficient conduct resulted in prejudice to the defendant – that there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would be different. State v. Maynard, 183 Wn.2d 253, 260, 351 P.3d 159 (2015). Courts engage in a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)

Where the claim is based on a failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. McFarland, 127 Wn.2d at 336; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)

5

Here, Rowley argues that there was no strategic reason to decline to object to that admission of either his mother's testimony or the child hearsay statements. He also argues that an ER 403 objection would have been sustained in both instances, and that the outcome of the trial would have been different without the inclusion of such prejudicial evidence. But he provides no factual or legal basis for these contentions. Without more, Rowley has failed to satisfy his burden of showing deficient performance or actual prejudice that would support a finding of ineffective assistance of counsel.

Affirmed.

Spearman, J.

WE CONCUR:

Leach, J.

Dwyer, J.

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Law Offices of Lise Ellner
P.O. Box 2711
Vashon, WA 98070

Tel: 206 930-1090
Fax 206 463-0758
liseellnerlaw@comcast.net