

66039-0

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NO. 66039-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

ALLEN JACK FROST,
Appellant

APPEAL FROM THE SUPERIOR COURT FOR KING
COUNTY
THE HONORABLE RICHARD McDERMOTT

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REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

After a bench trial, Allen Jack Frost was convicted of rape in the third degree for an alleged assault on Brandii Cantrell, who was the mother of his grandchild. The trial judge found that "Ms. Cantrell was able to recount the rape in great detail. I believe that her report remained consistent, in spite of many inquiries and many rounds of examination. . . . There is no doubt that Ms. Cantrell has given inconsistent stories about a number of things in the past, including the theft, inconsistent stories to the judge hearing the child custody case [in which the Frosts sought third-party custody of Cantrell's daughter, Kendle], inconsistent stories to the authorities who were investigating various allegations of drug possession. Nevertheless, I was convinced in watching her in this courtroom that she was telling the truth. Her reaction to the questions, her body language, the way she conducted herself and the way she answered to me was indicative of someone who was profoundly and permanently affected, in a negative way, consistent with an event of this nature." Court's Oral Opinion @ 4.

Frost had urged his attorney to talk with Dr. Kevin Connolly, a clinical psychologist with more than 25 years' experience, who suggested that Ms. Cantrell's early diagnosis of bi-polar disorder "can go hand in

hand with a personality disorder, such as borderline personality disorder or psychopathic personality disorder. The latter diagnoses struck me as something that should be explored in Brandii's case. It would also be crucial for the evaluator to be not only expert in psychopathy and borderline phenomena, but also to have all treatment records available." Declaration of Kevin Connolly (supporting motion for new trial)

Dr. Connolly explained: "Borderline personality is sometimes described as an 'as if' personality. Such a person can be whatever others want her to be. She can mimic emotional states that do not truly pertain to anything she has experienced. People with borderline personalities can be pathological liars. They actually convince themselves that what they are seeing is true. . . . Persons with borderline personality can be quite convincing in their lies because they give every outward indication that they are relating something real. They will also cling to the story under pressure, and in some cases have almost perfect memory for the details of the lie, making it very difficult to determine the truth without external verification" *Id.*

While Ms. Cantrell's courtroom demeanor struck the trial judge as consistent with her narrative, Dr. Connolly believed her actions were inconsistent with it: "I have been informed that Brandii willingly left

Kendle in the care of Jack and Carol at many points after she alleges that she was raped. In fact, it appears that she did so even during the course of the rape trial. Such behavior would be consistent with what is called a 'psychopathic slip,' in this case a slippage in her story that Jack truly was a rapist. No one leaves their child with someone who raped them, or even in their household, when they have other options." *Id.*

Mr. Frost's attorney did not speak with Dr. Connolly or an equivalent expert, did not read Dr. Connolly's written statements, did not call Dr. Connolly or an equivalent expert as a witness, did not move for a psychological examination of Mr. Frost's accuser.

Mr. Frost subsequently moved for a new trial. His motion was denied. He subsequently filed this appeal.

B. ARGUMENT

(1) Counsel's decision not to call Dr. Connolly or an equivalent expert witness was not a "legitimate tactical decision" because it was not based on investigation.

The State suggests that not calling Dr. Connolly was a "legitimate tactical decision." Respondent's Brief @ 11. The State also argues that the court can't question "legitimate" trial strategy. Respondent's Brief @ 13.

The decision not to call either Dr. Connolly or an equivalent expert witness might have been legitimate if it had been based on investigation, but it was not. A legitimate strategy must be a matter of choice. And that choice must be based on information. Mr. Frost's counsel lacked the requisite information. The State has not disputed Mr. Frost's statement that counsel "refused to read the declarations and would not speak with Dr. Connolly." Declaration of Allen Jack Frost (supporting motion for new trial). Therefore, counsel did not really make a choice. At trial, he refused to go down a path he had never explored.

(2) Case law that supports a decision not to call a specific witness does not extend to a decision not to call any witness with specific expertise.

The State suggests that

The case law that The State cites refers to a decision not to call a specific witness. It does not embrace a decision not to call *any* witness who has a specific kind of expertise. It does not embrace a decision not to speak before trial with a specific witness. It does not embrace a decision not to speak before trial with *any* witness who has a specific kind of expertise

(3) Counsel's early failures do not justify counsel's later failures.

The State notes that Dr. Connolly's opinion was unknown.

[Respondent's Brief @ 15] If counsel had made contact with Dr. Connolly before the trial, it would have been known.

The State considers it "telling" that Dr. Connolly did not observe any of the trial. [Respondent's Brief @ 31] Indeed, it was telling: Dr. Connolly did not observe the trial because Mr. Frost's counsel had not retained him -- or anyone else with similar expertise -- as either an expert witness or an expert consultant.

The State says that Dr. Connolly's statement about Ms. Cantrell was not available at the time of the trial. [Respondent's Brief @ 19] It was not -- but if Mr. Frost's counsel had spoken with Dr. Connolly in advance and had asked him for a written statement, it might have been available earlier.

The State notes that Dr. Connolly's statement about Ms. Cantrell was not made before the trial. [Respondent's Brief @ 31] It had not been made because it had not been solicited.

The State says that the evidence was not available. [Respondent's Brief @ 15] Indeed, it was not. But if counsel had made contact with Dr. Connolly before the trial, it would have been.

4) Defendant's' own choices -- which counsel ignored -- are relevant.

Case law makes it clear that the reasonableness of counsel's actions depends in part on the defendant's own opinions and strategic choices. Here, Mr. Frost urged his counsel to interview Dr. Connolly, or at least to look at Dr. Connolly's written statements. Mr. Frost's counsel refused. Yet the *Strickland* court, weighing a claim of ineffective assistance by a man who had pleaded guilty to murder and whose attorney had not used character witnesses or ordered a psychiatric examination to establish mitigating factors at his sentencing, said that the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . [I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States v. Decoster*, *supra*, at 372-373, 624 F.2d at 209-210." Strickland v. Washington, 466 U.S. 668, 691 (1984).

Made in a vacuum, Mr. Frost's counsel's decision not to investigate might have been reasonable. Made in the face of Mr. Frost's urging, it was not.

(5) **Admissibility would have been a question for the trial court.**

The State argues that the information would have been irrelevant and inadmissible. [Respondent's Brief @ 15]

ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Evidence Rule 702.

Admissibility would have been a matter for the trial court to decide. The *Barnard* court, ruling on the admissibility of psychiatric evidence with which defendants in a marijuana importing case wanted to impeach the credibility of a co-defendant who had testified against them, said that "we, like other courts that have considered the matter, are unwilling to say that when [psychological or psychiatric] testimony is offered, the judge must admit it. See *United States v. Rosenberg*, S.D.N.Y., 1952, 108 F.Supp. 798, 806, *aff'd*, 2 Cir., 1952, 200 F.2d 666; *United States v. Daileida*, M.D.Pa., 1964, 229 F.Supp. 148, 153-154.

"The admissibility of the proffered testimony was for the judge, and in deciding whether to admit expert testimony, 'the trial judge has broad discretion . . . and his action is to be sustained unless manifestly erroneous.' *Salem v. United States Lines*, 1962, 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313." *United States v. Barnard*, 490 F.2d 667 (9th Cir. 1973).

The *Barnard* court also made it clear that one of the main reasons for excluding psychological expertise was the fear that expert testimony might unduly influence the jury. Psychological or psychiatric opinion "may cause juries to surrender their own common sense in weighing testimony." But this was not a jury trial. This was a bench trial. Washington courts have recognized that a judge is much less likely to be swayed by prejudicial and even inadmissible evidence than a lay jury, and that a judge may hear evidence that a lay jury could not.

"The admission of . . . irrelevant testimony does not warrant reversing Read's convictions because we presume the trial judge did not consider inadmissible evidence in rendering the verdict. . . [J]udges in bench trials may be asked to exclude probative evidence on the ground it is unfairly prejudicial. No judge could rule on such a request without

considering the challenged evidence. And yet, in a bench trial, it is the consideration of such evidence by the judge that the objecting party seeks to prevent. The same is true of all challenged evidence in a bench trial.

"Like our decision in *Miles*, other courts acknowledge the unique demands of bench trials:

"It must be recognized that the very nature of the duties of a judge often require him to have knowledge of inadmissible evidence.

Every time he makes a ruling determining evidence inadmissible,

he has to know what the inadmissible evidence consists of, and if

he is the fact finder, he must eliminate [this evidence] from his

consideration in determining the facts.' "*Hawkins v. Marion Corr.*

Inst., 62 Ohio App. 3d 863, 869, 577 N.E.2d 720, *overruled on*

other grounds by, 55 Ohio St. 3d 705, 562 N.E.2d 898 (1990).

Nonetheless, virtually no United States court has held this process

to be unfair. 'In bench trials, judges routinely hear inadmissible

evidence that they are presumed to ignore when making decisions.'

Harris v. Rivera, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d

530 (1981)." *State v. Read*, 147 Wn.2d 238, 245 (Sept. 2002)

State v. Read, 147 Wn.2d 238, 245 (Sept. 2002).

(6) The State's analogy to battered woman syndrome misses the mark.

The State suggests that Ms. Cantrell's otherwise-inexplicable decision to leave her infant daughter with the man who had allegedly raped her can be understood by analogy to battered woman syndrome, in which a woman who is beaten repeatedly cannot bring herself to leave her assailant. Respondent's Brief @ 23.

But the response of a rape victim and the classic response of a battered woman are not at all the same thing. In *Ciskie*, which involved expert testimony about the state of mind of a woman who had allegedly been raped four times in the course of a two-year relationship she had not left, the court said: "Counsel for appellant and amicus argue that battered woman syndrome and rape trauma syndrome are essentially the same. This characterization is not precise, however. The testimony proffered by the State discussed the battered woman syndrome as a subgrouping of the broader diagnosis of post-traumatic stress disorder. The trial judge, who showed great skill in this very difficult case, carefully distinguished between rape trauma syndrome and the battered woman syndrome." State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988).

In *Ciskie*, the expert testimony helped the trier of fact to understand behavior by the alleged victim that lay outside common experience. *Id.*

(7) The trial court's denial of Appellant's motion for a new trial has no bearing on the issue of prejudice.

The State notes that on Appellant's motion for a new trial, the court found that there had been no prejudice. Respondent's Brief @ 33.

This is irrelevant, because an appellate court hears a claim of ineffective assistance *de novo*. "We review a challenge to the effective assistance of counsel *de novo*.' *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995)" *State v. Larson*, 160 Wn.App. 577, ¶21 (March 2011). Beyond that, the judge who heard this case made it clear that the verdict posed perhaps the most agonizing decision of his judicial career. He called it "probably one of the [most] difficult cases I have ever handled." RP September 1, 2010 23. Having gone through the process of weighing the evidence, and having concluded that he trusted his reaction to the witness' demeanor, he could not reasonably have been expected to conclude that he had actually been duped. This does not reflect badly on the judge. It is merely a reflection on human nature.

Had the judge known more about Ms. Cantrell's possible mental state before he formed a lasting impressin based on her demeanor, there is a reasonable probability that he would have reacted differently. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694.

This is a significantly lower bar than "more probable than not." "The reasonable probability standard was purposefully constructed to stress the defendant's constitutional right to counsel and should not be confused with tests that present a higher standard of proof. . . ." State v. Crawford, 159 Wn. 2d 86, 105 (2006).

This was not a case in which the prosecution had presented scientific evidence, or in which the two sides had provided radically different accounts of the facts, or in which introduction of an expert

witness might have led to scientific evidence against the defendant, which were the circumstances that led the court to find no prejudice in *Harrington*. Harrington v. Richter, 562 U.S. ___, (2011).

In Davis, the court found no prejudice because "there was overwhelming evidence to support a finding of guilt." Personal Restraint of Davis, 152 Wn.2d 647, 701. That was hardly the case here. The case hinged on the credibility of a single witness, and the court found that the case turned on demeanor, rather than evidence.

By not even talking to Dr. Connolly or anyone else with similar expertise, counsel deprived himself of an entire line of argument. "Although we are unable to ascertain whether counsel's lack of preparation prejudiced defendant by depriving him of evidence that would have been helpful to his case, we must still consider whether defendant was prejudiced because counsel's lack of preparation caused him to overlook obvious legal issues and arguments at trial. SEE MOORE v. UNITED STATES, 432 F.2d 730, 735 (3d Cir. 1970)." State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (February 1978).

(8) Talking to Dr. Connolly would not have constituted an "exhaustive" investigation.

The State notes that an attorney need not perform an exhaustive investigation. Respondent's Brief @ 13. The case law does not define "exhaustive." See, e.g., Harrington, 131 S.Ct. 770 (2011). But faced with a situation in which the entire case rests on the credibility of a single prosecution witness and one's client is pleading for a consultation with an experienced psychologist who could cast doubt on that witness' credibility, deigning to speak with the expert -- or to some other expert, or at least to look at the expert's written declarations -- hardly qualifies as exhaustive.

To provide effective representation, "counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (citing Strickland, 466 U.S. at 691)."
Personal Restraint of Brett, 142 Wn.2d 868, 873 (2001).

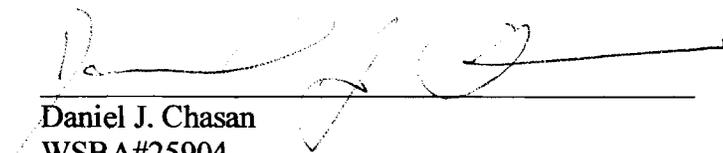
There is a huge difference between not adding mere additional detail and ignoring an entire sphere of inquiry. The *Elmore* court, which was faced with an ineffective assistance claim from a man who had been sentenced to death for raping and murdering his stepdaughter, but whose counsel had not consulted mental health experts or presented mental

health evidence as mitigation before the man was sentenced to death, noted that "[i]n *Mak*, 970 F.2d at 619, the Ninth Circuit held that the failure of defense counsel to present any humanizing evidence from members of the defendant's family or community fell below the objective standard of reasonableness under prevailing professional norms. In a more recent case from the Ninth Circuit, *Babbitt v. Calderon*, 151 F.3d 1170 (9th Cir. 1998), the court held that counsel's failure to present evidence of his tortured family history, his good deeds as a child, his learning disability, and his service in Vietnam did not fall below the accepted standard of attorney practice. There the defense attorney hired an experienced investigator who thoroughly investigated defendant's background. Additionally, counsel called family members and other witnesses to testify to the defendant's good character. In other words, counsel had presented humanizing evidence. *Id.* at 1176. The court also held that there was no prejudice from the decision not to present the additional evidence urged by the defendant because it would have been cumulative. *Id.*" Personal Restraint of Elmore, 162 Wn. 2d 236, 265. No one investigated the subject of Ms. Cantrell's state of mind, and the evidence gained by such an investigation would not have been merely cumulative.

C. CONCLUSION

Because Allen Jack Frost received ineffective assistance of counsel, the court should reverse his conviction and remand the case to Superior Court for a new trial.

Respectfully submitted this 30th day of September, 2011.



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