

70244-1

70244-1

NO. 70244-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIKADIR KHALIF,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUZANNE R. PARIEN

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. A person 18 years of age or older is guilty of second degree assault of a child if, with intent to commit a felony, the person assaults a child under the age of 13. Khalif, who was 18 years old, intended to commit child molestation when he pulled nine-year old R.E.S. onto his lap; kissed her on the mouth; dragged her on the floor toward the bedroom telling her, "I have a surprise for you in the room"; and tried to unbuckle her pants. Is there substantial evidence in the record to support Khalif's conviction for second degree assault of a child?

2. Courts recognize that defense counsel may choose to not request a jury instruction for a lesser included offense of the charged crime, and that such "all or nothing" strategy is a reasonable approach. Defense counsel's theory in this case was that everything that R.E.S. had ever said about the incident with Khalif was a fictional story she had created in her mind; defense counsel did not request a jury instruction for the lesser included crime of fourth degree assault. Was counsel's performance adequate?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 22, 2011, the State charged the defendant, Abdikadir A. Khalif, with one count of first degree child molestation; the State alleged that on or about June 17, 2011, Khalif, being at least 36 months older than R.E.S., had sexual contact for the purpose of sexual gratification with R.E.S, who was less than 12 years old and not married to Khalif. CP 1. On September 14, 2012, the State filed an amended information adding one count of second degree assault of a child. CP 21-22. The State alleged in count two that on or about June 17, 2011, Khalif, being 18 years of age or older, with intent to commit the felony of first degree child molestation did intentionally assault R.E.S, a child under the age of 13. CP 21-22. A jury trial was held before the Honorable Suzanne Parisien. At the conclusion of the trial, the jury convicted Khalif of second degree assault of a child, and acquitted him of first degree child molestation. CP 84-85. The trial court imposed a standard

range sentence of 45 months. 7RP 18;<sup>1</sup> CP 93-101. Khalif now appeals.

## 2. SUBSTANTIVE FACTS

Mumin Ayan has two daughters, R.E.S. and F.S. 3RP 68. In June of 2011, they were nine and seven years old, respectively. 2RP 109; 3RP 35, 68-69, 71. Ayan lived with the two girls and her friend, Nikki. 3RP 68. A friend of Ayan and Nikki, Abdi Fatah, introduced Khalif to Ayan in late May of 2011. 3RP 72. Sometime in June of 2011, Fatah asked Ayan if Khalif, 18 years old at the time, could stay at her house for a few days, and Ayan agreed. 1RP 52; 3RP 75-76; Ex. 6.

On June 17, 2011, Ayan needed to leave the house to go shopping. 2RP 123; 3RP 79. The girls wanted to watch a television show, so Khalif volunteered to babysit. 2RP 123; 3RP 79. Khalif suggested to the girls that they play hide and go seek, which they did for a few minutes, but then the girls stopped because they wanted to watch television. 2RP 125; 3RP 44. Khalif

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<sup>1</sup> The Verbatim Report of this Jury Trial consists of volumes referred to in this brief as: 1RP (February 28, 2013); 2RP (March 4, 2013); 3RP (March 5, 2013); 4RP (March 6, 2013); 5RP (March 7, 2013); 6RP (March 8, 2013); and the sentencing hearing, 7RP (April 12, 2013).

sat on the couch and asked the girls to sit on his lap. 2RP 126; 3RP 44. The girls did not comply with his request so he started pulling R.E.S. by her hands toward him to make her sit on his lap. 2RP 126-27. R.E.S. tried to push him away saying, "No, no." 2RP 126. Once Khalif had R.E.S. on his lap, he kissed her on the mouth. 2RP 128. R.E.S. pushed him off because it "felt gross"; she was able to get away but then Khalif grabbed her again and started pulling her toward the bedroom, dragging her on the floor. 2RP 130-31. As Khalif was dragging R.E.S. to the bedroom, he said, "I have a surprise for you in the room," and tried to unbuckle her pants. 2RP 142-43. R.E.S. was able to break free from Khalif before he could get her pants undone. 2RP 142-43.

Once R.E.S. broke away from Khalif, she immediately went to the bathroom, closed the door, and called her mother from her cellular phone. 2RP 134. R.E.S., in tears, whispered to her mom that Khalif was trying to touch her. 2RP 134; 3RP 81. Ayan told R.E.S. to bring F.S. into the bathroom with her and to call 911 immediately. 2RP 134-35; 3RP 81. R.E.S. complied. 2RP 135; 3RP 50. R.E.S., crying, told the operator she felt sick, like she was going to throw up, and that he [Khalif] tried to touch her in her "private parts." Ex. 22. As R.E.S. was on the phone with the

operator, Kent Police Department (KPD) Officer Lowrey arrived at her house. 1RP 16-17; 2RP 136.

Officer Lowrey made contact with the two girls, who were scared, shaking and crying. 1RP 16-17. R.E.S. was trembling and crying uncontrollably. 1RP 19, 39. KPD Officer Clay also responded to the call. 1RP 43-44. When he arrived to the apartment complex he contacted Khalif, who matched the description provided by dispatch. 1RP 46-47. Officer Clay asked Khalif where he lived, and Khalif motioned to Ayan's apartment. 1RP 48. Officer Clay then asked Khalif who else was in the apartment, and Khalif said two girls that were in the bedroom. 1RP 49-50. While the police were at the residence, Ayan arrived. 3RP 83.

Later, Ayan took R.E.S. to Valley Medical Center because she was complaining of pain in her arm and stomach. 3RP 85. Jeffrey Goon, a physician's assistant, treated R.E.S. and diagnosed her with strain to her arm and abdominal wall. 3RP 8-10, 15.

On June 24 2011, Carolyn Webster, a child interviewer, met with R.E.S. and asked her about the incident involving Khalif. 2RP 25, 31, 48. During the interview R.E.S. told Webster, among

other things, that Khalif kissed her, pulled her, and tried to reach down her pants. 2RP 68-70.

R.E.S. testified before a jury on March 4, 2013. 2RP 107. During direct examination R.E.S. indicated she did not remember the incident fully, as she was consciously trying to forget about it because, "I didn't want to remember it." 2RP 127. R.E.S. also admitted during cross-examination that she did not remember every little detail from that evening, and that after the defense interview she tried to think about the event. 2RP 160, 165. R.E.S. testified that she told the jury only things she remembered happening, rather than what she was reminded of after watching the child interview video or talking with people. 2RP 167.

C. ARGUMENT

1. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT KHALIF'S CONVICTION FOR SECOND DEGREE ASSAULT OF A CHILD.

Khalif argues that the State failed to prove all of the elements of second degree assault of a child. Khalif specifically claims that the State did not prove that he intended to commit the crime of first degree child molestation, and attempts to support his argument by erroneously claiming that the jury returned

inconsistent verdicts. Khalif's argument should be rejected because there was sufficient evidence for a rational trier of fact to find that Khalif's intent when he pulled R.E.S. toward the bedroom, while trying to unbuckle her pants, was to have sexual contact with her.

- a. There Was Sufficient Evidence In The Record For The Jury To Find That Khalif Intended To Commit The Crime Of First Degree Child Molestation.

It is not the role of the reviewing court to determine whether or not it believes the evidence at trial established guilt beyond a reasonable doubt; "[i]nstead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (italics added). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Ware, 111 Wn. App. 738, 741, 46 P.3d 280 (2002). "A person is guilty of child molestation in

the first degree when the person *has, or knowingly causes* another person under the age of eighteen *to have, sexual contact* with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.083(1) (italics added). Thus, for the jury to convict Khalif of the crime of first degree child molestation, the jury had to find that Khalif *had* sexual contact with R.E.S. or knowingly caused R.E.S. *to have sexual contact* with him. By contrast, to convict Khalif of second degree assault of a child as charged, the jury had to find only that Khalif *intended* to have sexual contact with R.E.S. RCW 9A.36.021(1)(e).

A person 18 years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of 13 and the person commits the crime of assault in the second degree against a child. RCW 9A.36.130(1)(a). A person is guilty of assault in the second degree if he or she with intent to commit a felony, assaults another.<sup>2</sup> RCW 9A.36.021(1)(e). Child molestation in the first degree is a class A felony. RCW 9A.44.083(2). Thus,

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<sup>2</sup> An assault is an intentional touching or striking of another person, with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or the striking would offend an ordinary person who is not unduly sensitive. 11 Wash. Prac., Pattern Jury Instr. Crim. § 35.50 (3d ed 2008).

for the jury to convict Khalif of second degree assault of a child, the jury had to find that Khalif, with intent to commit child molestation in the first degree, intentionally assaulted R.E.S.

There was sufficient evidence for any rational trier of fact to find that Khalif assaulted R.E.S. with intent to commit the crime of child molestation. In determining the reliability of evidence presented, circumstantial and direct evidence are given equal weight. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This is applicable to any element of the crime, including intent; “specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” State v. McCreven, 170 Wn. App. 444, 476, 284 P.3d 793 (2012) (quoting Delmarter, 94 Wn.2d at 638), rev. denied, 176 Wn.2d 1015 (2013).

The evidence presented at trial established that Khalif pulled R.E.S. toward him in order to have her sit on his lap. 2RP 126-27. R.E.S. resisted by trying to push him away and saying “no, no.” 2RP 126. Khalif was able to overcome R.E.S., and once in his lap, Khalif kissed her. 2RP 130. Khalif then dragged her across the floor toward the bedroom and said, “I have a surprise for you in the room” and tried to unbuckle her pants. 2RP 131-32, 143. R.E.S.

testified that although Khalif tried to get her pants unbuckled, he never actually succeeded. 2RP 143. R.E.S. never testified that Khalif actually touched her inappropriately; she was always consistent that Khalif “tried” to touch her.

Khalif argues that the stories told by R.E.S. to support the conviction of first degree child molestation were so inconsistent that the jury acquitted Khalif of the charges, so it follows that the evidence to support the charge of second degree assault of a child was also insufficient. Credibility determinations are reserved for the trier of fact, and an appellate court “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Thus, the mere existence of inconsistent or differing evidence does not negate the sufficiency of the State’s evidence as to the second degree assault. Id. Furthermore, the trial testimony of Ayan, Webster, and Officer Lowrey, as well as the call to 911, corroborated R.E.S.’ statements that Khalif tried to touch her inappropriately.

The corroborative evidence presented established that as soon as R.E.S. was able to break away from Khalif, she called her mother and told her that Khalif was trying to touch her. 2RP 134.

According to Ayan, when R.E.S. called her, she said, “Oh, this guy... is trying to, you know touch on me and he is pulling on me.” 3RP 81. And when R.E.S. called 911 she told the operator that he [Khalif] was trying to touch her on her “private parts.” Ex. 22. As soon as the police arrived, R.E.S. told Officer Lowrey that Khalif tried to put his hands down her pants. 1RP 17-18. Similarly, when she was interviewed by Webster, R.E.S. said that Khalif tried to reach down her pants. 2RP 81.

In sum, there was sufficient evidence in the record to support an inference that when Khalif pulled and dragged R.E.S., his intention was to have sexual contact with her.

b. The Verdicts Rendered By The Jury Were Consistent.

Khalif argues that the insufficiency of the evidence is highlighted by inconsistent verdicts. Khalif’s argument is meritless because the verdicts in this case are consistent.

In order for the jury to find Khalif guilty of first degree child molestation, the jury had to find that Khalif *had* sexual contact with R.E.S.; and for the jury to find Khalif guilty of second degree assault of a child, the jury had to find only that he *intended to have* sexual contact with R.E.S. A verdict of not guilty as to the first degree

child molestation charge is thus not inconsistent with a verdict of guilty as to second degree assault of a child.

But even if this Court believes there is some inconsistency in the verdicts, Khalif's conviction should be affirmed. Where a verdict is supported by sufficient evidence from which the jury could rationally find Khalif guilty beyond a reasonable doubt, the reviewing court will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count. State v. Ng, 110 Wn.2d 32, 750 P.2d 632 (1988); see State v. Goins, 151 Wn.2d 728, 733, 92 P.3d 181 (2004) (in holding that inconsistent verdicts do not warrant reversal, the court noted juries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity).

Khalif acknowledges that this is the rule, but asks this Court to set it aside and scrutinize the "inconsistent" verdicts. He claims this case requires greater scrutiny than Goins because Khalif did not admit to child molestation.

As Khalif correctly states, this case is distinguishable from Goins. The verdicts in Goins were irreconcilably inconsistent. Goins was charged with second degree assault with intent to

commit indecent liberties. Id. at 731. The court also submitted a special verdict to the jury to determine if Goins acted with sexual motivation. Id. The jury convicted Goins of second degree assault but found that Goins did not act with sexual motivation. Id. Thus, in Goins, the defendant either committed the assault for the purposes of sexual gratification or he did not. Id. at 732. The jury never considered whether Goins had committed the crime of indecent liberties. Instead it only considered whether Goins had committed an assault with the intent to commit indecent liberties.

By contrast, here the jury considered whether Khalif was guilty of the crime of child molestation, and whether he was guilty of assault with the intent to commit child molestation. The verdicts simply indicate that the jury found that Khalif intended to commit the crime of child molestation, but he failed to accomplish it. This is consistent with acquitting Khalif of first degree child molestation, while finding him guilty of second degree assault of a child. Khalif's conviction should be affirmed.

2. DEFENSE COUNSEL'S DECISION TO NOT REQUEST A JURY INSTRUCTION FOR A LESSER INCLUDED OFFENSE WAS A SOUND "ALL OR NOTHING" STRATEGY.

Khalif further argues that he received ineffective assistance of counsel because his attorney did not request a jury instruction for the lesser included offense of fourth degree assault. Khalif's argument fails because counsel's "all or nothing" approach was not deficient and Khalif cannot show prejudice.

In order to establish ineffective assistance of counsel, the defendant must show (1) that his attorney's performance fell below a minimum objective standard of reasonable conduct, and (2) that but for his counsel's errors, there is a reasonable probability that the results at trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In other words, a defendant must show both deficient performance and resulting prejudice. State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). If the defendant fails to establish either prong, the court should reject the claim. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court will "make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Personal Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Because the presumption runs in favor of effective representation, the defendant must show that there were no legitimate strategic or tactical reasons for his attorney's conduct. McFarland, 127 Wn.2d at 336.

Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012), rev. denied, 176 Wn.2d 1023 (2013). Appellate courts presume that defense counsel's "all or nothing" approach is a legitimate trial tactic and does not constitute ineffective assistance of counsel. State v. Grier, 171 Wn.2d 17, 20, 246 P.3d 1260 (2011).

For instance, in Grier, the court held that defense counsel was not ineffective for failing to request a manslaughter instruction for the murder defendant even though her case met the two-pronged test established in State v. Workman.<sup>3</sup> The court concluded, “Grier and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.... That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel’s initial calculus; hindsight has no place in an effective assistance analysis.” Grier, 171 Wn.2d at 43. Likewise, in State v. Breitung, 173 Wn.2d 393, 399, 267 P.3d 1012 (2011), defense counsel’s decision to not request a lesser included offense of fourth degree assault to the charged offense of second degree assault, where the defense theory was that no assault had occurred, constituted a reasonable “all or nothing” trial strategy, and was not ineffective assistance of counsel.

Here, Khalif was legally entitled to the lesser included instruction of fourth degree assault. However, as in Breitung,

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<sup>3</sup> Under Workman, a defendant is entitled to a lesser included instruction if (1) each of the elements of the lesser crime is a necessary element of the greater crime (the “legal prong”) and (2) the evidence supports an inference that the defendant committed the lesser crime (the “factual prong”). Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

defense counsel's theory of the case was that nothing had occurred that evening. Counsel argued during closing arguments that the events described by R.E.S. were a figment of her imagination. He said: "This is a little girl who made up a story and is trying to remember the details and struggling to do so." 4RP 51. Counsel's closing argument was premised by outlining the problems with the State's case: one, "this case rests almost entirely on the accusations of one individual"; two, "there is no corroboration of those accusations"; and three, R.E.S. was coached. 4RP 48. Counsel finished by saying, "This is a case about a little girl who was left at home, who got scared, called her mom, 911, her imagination spun, she told a story, and she lost track of the details." 4RP 58. Counsel's strategy was undoubtedly an "all or nothing" approach, and just as in Grier and in Breitung it was not ineffective to forgo a lesser included instruction.

In sum, Khalif cannot demonstrate that his attorney's performance fell below a minimum objective standard of reasonableness in not requesting an instruction on the lesser included offense of fourth degree assault. Thus, his conviction should be affirmed.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Khalif's conviction.

DATED this 26<sup>th</sup> day of March, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ABDIKADIR KHALIF, Cause No. 70244-1 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 26 day of March, 2014



Bora Ly  
Done in Seattle, Washington

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