

73517-9

73517-9

FILED
May 05, 2016
Court of Appeals
Division I
State of Washington

NO. 73517-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ZIELINSKI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TANYA L. THORP

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANGELA J. KAAKE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS.....	2
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	7
ZIELINSKI HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL	7
1. Zielinski Has Failed To Establish Deficient Performance Based On Trial Counsel’s Failure To Object To Annette Griffith’s Testimony	8
2. Zielinski Has Failed To Establish A Reasonable Probability That The Outcome Of The Trial Would Have Been Different Had The Evidence Not Been Admitted	10
D. <u>CONCLUSION</u>	122

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 8, 10

Washington State:

In re Pers. Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004) 8, 9

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011) 8, 10

State v. Johnston, 143 Wn. App. 1,
177 P.3d 1127 (2007) 8, 10

State v. Madison, 53 Wn. App. 754,
770 P.2d 662 (1998) 8

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995) 7

A. ISSUE PRESENTED

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result. Annette Griffith testified to an out-of-court statement made by her daughter, A.G., regarding the bed set that A.G. used as a child. A.G.'s reaction to the bed set was negative and she told her mother "I don't want anything to do with that bed." This testimony was not objected to at the time. In a non-responsive answer, Annette Griffith again testified regarding the comment by A.G. regarding the bed set, and this time defense counsel objected. The objection was sustained. A.G. also testified to this conversation with her mother with no objection. Here, the testimony from Annette Griffith regarding an out of court statement by A.G., was not so prejudicial that it affected the outcome of the trial, because the statements also were properly admitted into evidence through A.G. when she testified. Has Zielinski failed to establish ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Zielinski was convicted by jury trial of three counts of Rape of a Child in the First Degree, and one count of Rape of a Child in the Second Degree, all with a Domestic Violence designation. CP 190-93, 194-95. This appeal follows.

2. SUBSTANTIVE FACTS.

A.G. was in Kindergarten when her father, Appellant Zielinski, started molesting her. RP 414. A.G. remembers the very first time it happened. It was on September 11, 2001, because at Kindergarten that day, they had learned the pledge of allegiance. RP 411. A.G. was proud of what she had learned, and when her father came to tuck her in, just like he did every night, she told him that she had learned it. RP 414. She recited it to him, and her father told her he had something special for her. RP 417. He then started rubbing her back, then moved his hand down to her butt, and then around to the front, and touched her vagina over her clothing. RP 415. Zielinski told her not to tell anyone. RP 417. This type of touching happened on a regular basis and gradually

progressed from outside her clothing to inside her clothing.

RP 416.

A.G. also remembers the first time her father raped her.

A.G. was in third grade, and it was the day she learned how to write her name in cursive. RP 428, 430. And, again just as A.G. was “rewarded” for learning the Pledge of Allegiance, she was “rewarded” for learning how to write cursive. RP 430. Zielinski laid down next to her, told her to be quiet, took her pants off, and inserted his fingers, and then his penis into her vagina. RP 430, 436. A.G. remembers a lot of pain, and a lot of blood. RP 437, 453. In retrospect, A.G. remembered having some sort of an allergic reaction to the condom that Zielinski used the first time. RP 439-40. A.G. remembered that she felt sore, like she was not going to be able to ever walk again. RP 438.

A.G. was also able to remember other specific incidents where her father raped her and would have her kneel down on the floor so that he could ejaculate on her chest. RP 447. She testified to other specific details about a time when Zielinski gave her alcohol. RP 585. She testified in detail about steps she took to hide the abuse from her mother and family, for example, doing her own laundry and cleaning the blood from her mattress. RP 460,

464-65. She would whimper into her pillow to try to muffle the sound of her own crying. RP 436, 551.

Zielinski continued raping his daughter A.G. until she was 13 years old, up until the point that Annette Griffith took the kids and left the family home on March 12, 2009. RP 450, 559. A.G. never told anyone about the sexual assaults until 2013. RP 570. Zielinski told A.G. many times not to tell anyone. RP 417. A.G. testified that Zielinski told her that people would think she was a “freak” if she told them, and she believed him. RP 492, 505. A.G. testified that she was afraid that her father would hurt her or her family if she told anyone. RP 414, 491. A.G. was afraid that her mom would not believe her. RP 491. A.G. finally told her soon-to-be stepdad, Matthew Griffith, in February of 2013. RP 504-05.

Annette Griffith, A.G.’s mother, also testified at trial. RP 227. She testified about an incident with A.G., that occurred while they were preparing to move into their own home around June 2012, as they had been living at Annette’s parents’ house since March 12. RP 233, 270. Annette Griffith testified:

A [GRIFFITH]: I was trying – you know, I was – we were kind of excited to be out on our own again, and so I called her. I said, “Hey, you are going to be able to use your bed set again,” because it had just been

in storage, and she said, "I don't want anything to do with that bed."

And I said, "Do you want to talk about it?" And she said, "No, I'm not ready." And this was on a phone call.

And so I let it go.

RP 270. There was no objection to the testimony at that time.

The following colloquy took place several minutes after that first colloquy:

Q [PROSECUTOR]: Okay, now you were talking with her on the phone; without saying what specifically she said, how would you describe her demeanor or her tone when you were talking about this bed set?

A [GRIFFITH]: Just very short. No explanation, she just said, "I don't want anything to do with that bed."

[DEFENSE COUNSEL]: Objection, hearsay, move to strike.

A [GRIFFITH]: I'm sorry, just short.

THE COURT: Sustained.

Ladies and gentlemen of the jury, you will disregard the statement attributed to not the testifying witness.

You may re-ask your question, counsel.

Q [PROSECUTOR]: And again, without saying what specifically she said, how would you describe her demeanor or her tone of voice when you were having this conversation with her?

A. Just short and succinct.

RP 272-273.

A.G. testified at trial about the bed set and the conversation with her mother. RP 494-96. A.G. testified that “I told my mom I didn’t want anything to do with my bed.” RP 494. She further stated that she told her mom that she didn’t want anything to do with that bed “[b]ecause I didn’t want to have to relive it. I didn’t want to live back in that bed.” RP 494. A.G. also testified as follows:

Q [PROSECUTOR]: And when you said that “I don’t want anything to do with that --- that that bed set,” how were you feeling?

A [A.G.]: I was scared that I would have to go back into that bed.

For some reason it felt like a prison.

Q [PROSECUTOR]: And at that time did anyone kind of ask you about why you didn’t want this bed?

A [A.G.]: My mom didn’t question me at that time and I think that she was just trying to respect my privacy and that I would tell her when I was ready.

Q: And at that time did you feel ready?

A: No.

Q: Why not?

A: When you keep a secret for a really long time, you are afraid of how people might react to it, and I was afraid that she would be angry with me for not telling her for a long time or that she wouldn't believe me.

RP 495.

There was no mention of, or argument relating to, the bed set or the statements made by A.G. in either the State's closing, or in the defense closing. RP 742-88.

C. ARGUMENT

ZIELINSKI HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Zielinski claims that his trial counsel was ineffective for failing to object to Annette Griffith's testimony regarding the comment that A.G. made regarding the bed set that was in storage. Zielinski has failed to establish that his counsel was ineffective.

An ineffective assistance of counsel analysis begins with the strong presumption that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). For Zielinski to overcome this strong presumption, he must prove by a preponderance (1) that his trial counsel's performance was so deficient that it fell outside the wide range of objectively reasonable behavior based on consideration of all the

circumstances of the case, and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Conduct that can be characterized as legitimate strategy is not deficient. Grier, 171 Wn.2d at 33. The presumption of reasonableness can be overcome only by showing that there is no conceivable legitimate tactical reason for counsel's conduct. Id.

1. Zielinski Has Failed To Establish Deficient Performance Based On Trial Counsel's Failure To Object To Annette Griffith's Testimony.

To prove ineffective assistance of counsel based on the failure to object to evidence, Zielinski must show that the failure to object fell below prevailing professional norms, that the objection would likely have been sustained, and that the result of the trial would probably have been different if the evidence was not admitted. State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 714,

101 P.3d 1 (2004)). The decision whether to object is a “classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1998). This Court presumes that the failure to object was legitimate trial strategy, and Zielinski bears the burden to rebut this presumption. Davis, 152 Wn.2d at 714. He has failed to do so.

Zielinski has not rebutted the presumption that his counsel’s failure to object to this testimony was tactical. Defense failed to object the first time the statement was made by Annette Griffith. RP 270. The second time, although the prosecutor specifically stated to the witness not to testify to any statements, Ms. Griffith did so. RP 272. At that time, defense counsel objected and it was sustained and stricken from the record. RP 272-73. When A.G. testified, there was no objection during the two pages of testimony regarding the bed set. RP 494-96.

On three separate occasions, the subject of the bed set was brought up, and only once did defense counsel object. Zielinski argues that there was “no possible reasonable strategic basis” for the failure to object. Appellant’s Brief at 14. However, Zielinski fails to acknowledge that sometimes trial counsel does not object in order to not call attention to the inadmissible testimony. Perhaps

the second time Annette Griffith mistakenly mentioned the statement, counsel then felt the need to object.

Zielinski makes no argument as to why the failure to object was not a tactical decision, nor does the lack of an objection to the testimony demonstrate an absence of legitimate trial strategy. The Court presumes that the failure of Zielinski's trial counsel to object was the product of legitimate trial tactics. Johnston, 143 Wn. App. at 21.

2. Zielinski Has Failed To Establish A Reasonable Probability That The Outcome Of The Trial Would Have Been Different Had The Evidence Not Been Admitted.

Even if counsel's performance was deficient, Zielinski must also show that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. Grier, 171 Wn.2d at 33; Strickland, 466 U.S. at 689.

Even if the decision not to object was shown to be deficient performance by counsel, the results of the trial would not have been different. Notably, testimony regarding the bed set and A.G.'s reaction to hearing of the bed set was admitted later in the trial,

without objection. The jury heard similar, if not the same testimony from A.G. when she testified. RP 494. The testimony from A.G. regarding the bed set and her reaction to it when they were moving, is two pages of testimony in the nearly 200 pages of A.G.'s testimony. The bed set was never mentioned in closing argument by either party. There was substantial evidence apart from that one comment, that a reasonable jury would have convicted Zielinski without the bed set testimony by Annette Griffith.

This case hinged on the credibility of A.G. A.G. provided hours of testimony regarding the sexual abuse and rapes her father committed. RP 391-589. She provided many details, several of which were indirectly corroborated by other evidence. RP 757-60.

The jury found A.G. credible, as evidenced by the convictions on all charged counts. One statement by her mother about something that A.G. also testified to would not have changed the outcome of the trial.

Therefore, Zielinski has not established ineffective assistance based on counsel's failure to object to Annette Griffith's testimony.

D. **CONCLUSION**

Zielinski has not established ineffective assistance of counsel. Zielinski's convictions should be affirmed.

DATED this 5th day of May, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANGELA J. KAAHE, WSBA #30725
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, the attorney for the appellant, at Gibsonc@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Michael Peter Zielinski, Cause No. 73517-9, 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 5th day of May, 2016.



Name: Kirtsi Cooper Goodwin
Done in Kent, Washington