

No. 35007-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Charles Wayne Sifers,

Appellant.

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COURT OF APPEALS
DIVISION II
07 JUL 16 PM 1:21
STATE OF WASHINGTON
BY *[Signature]* DEPUTY

Lewis County Superior Court

Cause No. 05-1-00274-8

The Honorable Judge Richard L. Brosey

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT’S ERRONEOUS INTERPRETATION OF ER 801, ER 802, ER 803, ER 401, ER 402, ER 403 AND ER 608 IS AN ISSUE OF LAW REQUIRING *DE NOVO* REVIEW.

The issues raised by Mr. Sifers in the opening brief are subject to *de novo* review. Although Mr. Sifers’ claims of error relate to evidentiary matters, the issue involves interpretation of an evidence rule and is therefore a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003) . Respondent attempts to hide behind an “abuse of discretion standard”, which is inapplicable. Brief of Respondent, pp. 1-2.

The trial court allowed testimony that indirectly conveyed the content of hearsay statements, overruling Mr. Sifers’ hearsay and relevance objections. RP (1/30/06) 91-94; RP (2/1/06) 41-52. The trial court’s ruling was based on the erroneous conclusion that such indirect testimony did not violate the rule against hearsay. In fact, the rule against hearsay excludes testimony about a statement if the content of the statement can be inferred from the testimony. *State v. Johnson*, 61 Wn. App. 539 at 546-547, 811 P.2d 687 (1991); *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999).

Both Rita Trask and Deputy Spahn testified to facts that clearly and unmistakably conveyed the contents of S.T.’s hearsay statements. Ms.

Trask testified that her daughter cried very hard during an hour-long conversation, after which she called the sheriff's department, spoke to Stormy's mother, and spoke with an officer. RP (1/30/06) 96-98. She was asked if she remembered "the specific date" that her daughter was talking about. RP (1/30/06) 98. Her testimony conveyed that S.T. made a disclosure consistent with her testimony, accused Mr. Sifers, and expressed fear that he would abuse Stormy. RP (1/30/06) 79-101. Deputy Spahn's testimony suggested that S.T.'s disclosures were consistent with her statements to Katie Braae (who had already testified and directly relayed S.T.'s hearsay statements). RP (2/1/06) 55-57.

The testimony as a whole was not demeanor testimony, although the witnesses did include some evidence about S.T.'s demeanor. RP (1/30/06) 79-120; RP (1/31/06) 17-162; RP (2/1/06) 25-62. Respondent contends that the demeanor testimony presented in this case was admissible. Brief of Respondent, p. 3, citing *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662, review denied at 113 Wn.2d 1002 (1989) and *In re Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185 (1985).

This argument does not support Respondent's position for two reasons. First, even if the demeanor testimony were admissible, the testimony went far beyond demeanor testimony. For example, Ms. Trask could have relayed information about S.T.'s demeanor without adding that

she then called the sheriff, spoke to an officer, and called Stormy's mother to warn her. To the extent the testimony went beyond demeanor testimony, it should have been excluded.

Second, the cases cited by Respondent are inapplicable. In *Madison*, the child's underlying hearsay statements were admitted under the child hearsay rule; the demeanor testimony was deemed admissible in conjunction with the hearsay itself. The proponent was not permitted to introduce any additional hearsay under the guise of demeanor testimony. *Madison*, at 759. In *Penelope B.*, the evidence involved nonassertive demeanor testimony observed during play therapy. The Court determined that the behaviors were not hearsay; thus, the issue raised by this appeal was not present. *Penelope B.*, at 654.

Here, by contrast, the testimony conveyed the content of S.T.'s statements, which were not otherwise admissible. It would have been simple to provide demeanor testimony untainted by evidence that allowed the jury to infer the content of S.T.'s statements. The introduction of extraneous evidence about the content of S.T.'s statements infected the demeanor testimony, and should have been excluded. *Johnson, supra*; *Sanchez, supra*.

Respondent does not contend that any error was harmless. The improper testimony was substantial, highlighted the consistency of S.T.'s

repeated disclosures, and conveyed the witnesses' belief that S.T. was credible. Because there is a reasonable probability that the error affected the verdict, the conviction must be reversed and the case remanded for a new trial. *State v. Everybodytalksabout*, 145 Wn.2d 456 at 468-469, 39 P.3d 294 (2002).

II. MR. SIFERS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Even the most experienced trial attorneys are capable of making mistakes that deprive their clients of the effective assistance of counsel. Trial counsel made such mistakes in Mr. Sifers' case. *See* Appellant's Opening Brief, at pp. 11-22. One such error was trial counsel's failure to argue ER 403 as an alternative basis for his objections to the testimony of Rita Trask, Chrissy Stark, and Deputy Spahn. *See* Appellant's Opening Brief, pp. 13-14. Respondent completely fails to address the merits of this argument. Brief of Respondent, pp. 4-8. Furthermore, Respondent makes no argument about defense counsel's failure to request a cautionary instruction, and does not present any argument on the issue of prejudice. Based on these apparent concessions, Mr. Sifers' conviction must be reversed for ineffectiveness, and his case remanded to the trial court for a new trial. *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998).

Where the record shows no reasonable strategic purpose behind counsel's deficient performance, a bare claim of "trial strategy" (such as that advanced by Respondent) will not defeat an ineffective assistance argument. Brief of Respondent, p. 6. Furthermore, any strategy relied upon must be reasonable, and there must be some evidence in the record that defense counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61 at 78-79, 917 P.2d 563 (1996).

Respondent does not articulate any reasonable strategic purpose that would justify defense counsel's failure to object to the inadmissible testimony. Nor does Respondent identify any evidence in the record that defense counsel actually had a reasonable strategic purpose and intentionally withheld his objections to advance that purpose. Brief of Respondent, pp. 5-6.

Instead, Respondent points to defense counsel's objections and arguments in favor of excluding other evidence as a sign that he "clearly understood the hearsay rule." Brief of Respondent, pp. 5-6. Respondent does not cite any authority supporting its claim that trial counsel's appropriate objections and demonstrated understanding of a court rule is sufficient evidence of reasonable strategy to defeat a claim of ineffective assistance. Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v.*

Barton, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001). The record establishes that counsel's failures to object served no legitimate strategy. Respondent is unable to identify any reasonable strategy, and has not cited any evidence showing that defense counsel was pursuing any such alleged strategy. Because of this, Respondent's claim that defense counsel's errors were "clearly trial strategy" is without merit.

Defense counsel was ineffective by failing to object to hearsay presented through six witnesses: Rita Trask, Chrissy Stark, Deputy Spahn, Katie Braae, Amanda Olson, and Lori Davis. *See* Appellant's Opening Brief, pp. 13-20. Respondent claims that the "vast majority [of the] complained-of testimony" was nonassertive, but refers only to the testimony of Rita Trask and Deputy Spahn to support this argument. Brief of Respondent, p. 6. Respondent's focus on these two witnesses is misplaced.

Defense counsel *did* object to the hearsay in the testimony of Ms. Trask and Deputy Spahn. RP (1/30/06) 91-92; RP (1/31/06) 15-18; RP (2/1/06) 42-48. Mr. Sifers' ineffective assistance argument with respect to their testimony was the failure to raise ER 403 as an alternative ground, as noted above. Respondent's assertions regarding these two witnesses are misplaced. Furthermore, any demeanor testimony offered by the

witnesses was contaminated with evidence that conveyed the substance of S.T.'s statements, as outlined above. *See Johnson, supra.*

In addition, Respondent's claim about the "vast majority" of the testimony is incorrect: the "vast majority" of the testimony consisted of S.T.'s statements to the witnesses about what had happened to her. *See, e.g.,* RP (1/30/06) 113, 115; RP (1/31/06) 88-90; RP (2/1/06) 31-33. Respondent does not contend that the statements were admissible under ER 803(a)(4) (statements for medical diagnosis or treatment), or under any other hearsay exception. Defense counsel should have moved to exclude the inadmissible testimony; his failure to do so denied Mr. Sifers the effective assistance of counsel.

For all these reasons, Mr. Sifers' conviction must be reversed. The case must be remanded to the trial court for a new trial.

III. THE PROSECUTOR'S MISCONDUCT WAS FLAGRANT AND ILL-INTENTIONED.

During her examination of Ms. Stark, the prosecutor commented in the presence of the jury that she was "not allowed to ask about the statements." RP (1/31/07) 24. Respondent fails to address this improper reference to matters outside the record. RP (1/30/06) 90, 96; RP (1/31/06) 24. Brief of Respondent, pp. 8-11. This misconduct was flagrant and ill-

intentioned, and requires reversal. *See* Appellant’s Opening Brief, pp. 22-23.

Respondent apparently agrees that the prosecutor committed misconduct by expressing her personal opinion during closing arguments. Brief of Respondent, p. 9. The prosecutor’s improper comment was prejudicial because the disagreement between the two experts was critical to the case. Respondent’s concession requires reversal. *State v. Price*, 126 Wn. App. 617 at 653, 109 P.3d 27 (2005).

Respondent also concedes that the prosecuting attorney’s comments about defense counsel were “inartful.” Brief of Respondent, p. 10. These “inartful” comments included a reference to defense counsel’s “testimony,” a request to “remember this attorney” whom she characterized as “a dang good talker,” “pretty dang good,” and “good at talking,” and a warning that “[y]ou can’t depend on the defense attorney.” RP (2/2/06) 186-187, 194. None of these disparaging comments were invited by defense counsel’s closing. They were disrespectful of defense counsel’s role, and sought to influence the jury to return a verdict based on improper considerations. *State v. Gonzales*, 111 Wn. App. 276 at 282, 45 P.3d 205 (2002). Mr. Sifers’ conviction must be reversed and the case remanded for a new trial. *United States v. Holmes*, 413 F.3d 770 at 776 (8th Cir. 2005).

Finally, Respondent erroneously contends that the prosecutor did no more than argue that corroboration was unnecessary for a conviction. Brief of Respondent, pp. 10-11. This is incorrect. The prosecutor asserted that S.T. "had no motive to lie" and suggested that S.T.'s testimony was sufficient for a conviction if the jury found her credible. RP (2/2/06) 193, 194. These statements are equivalent to arguing the jury would have to find S.T. was lying in order to acquit. Such arguments are clearly improper. *State v. Fleming*, 83 Wn.App. 209 at 213, 921 P.2d 1076 (1996).

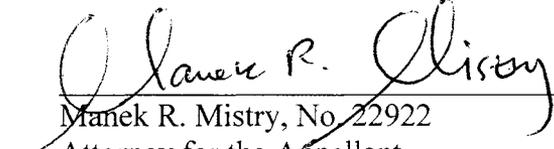
Respondent does not address Mr. Sifers' ineffective assistance claim as it relates to the prosecutorial misconduct. Nor does Respondent address Mr. Sifers' cumulative error argument. Accordingly, Mr. Sifers stands on his opening brief with respect to these arguments.

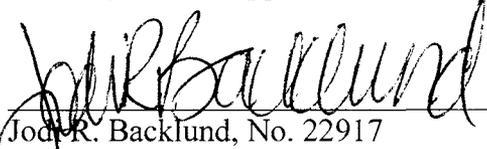
CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on July 16, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 16, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 16, 2007.



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