

Original

NO. 36235-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

KYLE SCOTT VINSONHALER and  
KLINTON JAMES VINSONHALER, Appellants

---

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT A. LEWIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00624-1 and  
06-1-00625-9

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BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by both appellate attorneys. Where additional information is necessary, or needs to be emphasized, it will be done so in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR DEALING WITH SEVERANCE OF DEFENDANTS (JOINTLY RAISED IN BOTH BRIEFS)

The first assignment of error is the joint one that is brought by both attorneys on appeal dealing with the issue of severance of the defendants. The claim is that they should have received separate trials. One of them is couched in terms of the trial court preventing the defendant, Kyle Vinsonhaler, his right to a fair trial because of the denial of the motion to sever. The other one dealing with Klinton Vinsonhaler deals with the ineffective assistance of counsel claim because the trial attorney did not join in the motion for severance.

The motion for severance brought by defendant, Kyle Vinsonhaler, (CP 16) and then later argued in front of the trial court (December 21, 2006, RP 187-189) dealt exclusively with the concept of a Bruton problem. (Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968)).

The Bruton issue was raised by the trial court with the prosecution and the prosecution elected to redact any cross-incriminating statements in its case in chief. (December 21, 2006, RP 192).

Separate trials have never been favored in the State of Washington. State v. Herd, 14 Wn. App. 959, 963, 546 P.2d 1222 (1976); State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970).

CrR 4.4(c) deals with severance of defendants. It provides as follows:

(c) Severance of defendant.

(1) a defendant's Motion for Severance on the ground that an out of court statement co-defendant referring to him is inadmissible against him shall be granted unless:

(i) The Prosecuting Attorney elects not to offer the Statement in the Case in Chief; or

(ii) Deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

CrR 4.4(c)(1).

The above Court rule, CrR4.4(c) was adopted to avoid the constitutional problem dealt with in the Bruton case. In Bruton, the United States Supreme Court held that the defendant was deprived of his confrontation rights under the sixth amendment when he was incriminated by a pretrial statement of a co-defendant who did not take the stand at trial. In our case, however, severance was not mandated by CrR 4.4(c) because the prosecution elected not to use the defendant's statements

about the other defendant in the State's case in chief. Also in our case, both defendants ultimately elected to testify at trial and by so doing they eliminated the potential Bruton problem all together. With both defendants on the stand, the prosecution had full opportunity to cross-examine them concerning statements they made to law enforcement. State v. Samsel, 39 Wn. App. 564, 567, 694 P.2d 670 (1985).

The State submits that there is no basis for the trial court to have even considered granting a severance when the prosecution chose to redact statements and not use them in its case in chief. Further, the problem was eliminated when both defendants testified. It stands to reason therefore that the fact that one of the defense attorneys did not join in the motion for severance would not implicate ineffective assistance of counsel.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 1 (KYLE VINSONHALER ONLY)

The first assignment of error raised solely by Kyle Vinsonhaler is a claim that the State's use of Dr. Stirling to testify to statements made by the child witness violated RCW 9A.44.120. The specific claim is that notice was not provided that the State was going to use Dr. Stirling's testimony under 9A.44.120. No one is disputing the fact that Dr. Stirling was listed as the State's witness from very early in the proceedings or that

they did not have an opportunity to review his reports or interview him prior to trial. In fact, when this question of notice was mentioned to the trial court, the Judge made the following ruling:

With regard to 9A.44.120, first regarding the notice issue that was raised previously, 9A.44.120 says a statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. It appears to me from the discussion of counsel in their knowledge of Dr. Stirling's report that the contents of the statement have been known prior to this and that there is sufficient notice of the fact that the State intended to offer the statement. So I deny the exclusion on the basis that proper notice was not provided.

(January 9, 2007, RP 210, L.24 – 211, L.12).

As case law has indicated, RCW 9A.44.120 does not require formal notice, nor does it prescribe a notice period. State v. Lopez, 95 Wn. App. 842, 851, 980 P.2d 224 (1999). The statutes notice provision is derived from the "catch all" hearsay exception contained in former Federal Rules of Evidence 803 (24). Lopez, 95 Wn. App. 851; State v. Hughes, 56 Wn. App. 172, 174 783 P.2d 99 (1989). This Federal rule has been interpreted as requiring sufficient notice to provide the adverse party with a fair opportunity to prepare to challenge the admissibility of the statement. Lopez, 95 Wn. App. 851 (citing United States v. Bailey, 581 F.2d 341, 348 (3<sup>rd</sup> Cir. 1978)). As the court in our case has indicated,

there was no surprise to the defense that the history taken by the doctor would be part of questioning of him by the State of Washington. The State submits that they had a fair opportunity to prepare to meet the statements because they had actual knowledge of the State's intent to admit statements.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3 (KYLE VINSONHALER ONLY)

The third assignment of error raised by Kyle Vinsonhaler only deals with a claim that trial counsel failed to seek a limiting instruction dealing with possible impeachment testimony by a co-defendant and thus violated his right of effective assistance of counsel. The specific claim is that the defendant received ineffective assistance based upon trial counsel's failure to seek a limiting instruction when the State called Detective Norton to rebut the co-defendant's claim that he had never said that the defendant had been alone with the complaining witness when she went to the bathroom and that the complaining witness did not want to be around the defendant after the incident.

The State responds that a limiting instruction was proposed by the defense and given by the trial court. The Defendant's Proposed Instructions to the Jury (CP 41) contain, in part, the instruction that was ultimately given by the trial court in its Court's Instructions to the Jury

(CP 71). In fact, the trial court makes mention that Instruction No. 7 of the instructions that the court was going to give was from the defense packet of instructions (January 10, 2007, RP 287, L. 23 – 25).

Instruction No. 7 from the court's instructions to the jury reads as follows:

Instruction No. 7

Evidence of prior inconsistent statements by witnesses has been admitted for impeachment purposes only.

This evidence may be considered by you for the sole purpose of weighing the witness' credibility and must not be considered by you for any other purpose.

Court's Instructions to the Jury (CP 71).

State submits that this is invited error. A party may not request an instruction and later complain on appeal that the requested instruction was given. Ball v. Smith, 87 Wn.2d 717, 556 P.2d 936 (1976); State v. Boyer, 91 Wn.2d 342, 344-345, 588 P.2d 1151 (1979).

V. RESPONSE TO ASSIGNMENTS OF ERROR NO. 1 (KLINTON VINSONHALER ONLY)

The first assignment of error raised by the defendant, Klinton Vinsonhaler, only deals with claims with ineffective assistance of counsel. The defendant makes four claims: the trial attorney should have moved to sever the cases; the trial attorney failed to request a limiting instruction

concerning Dr. Stirling's testimony; the trial attorney failed to impeach the complaining witness; and the trial attorney failed to object to the State's closing argument.

Great deference is given to trial counsel's performance and the analysis always begins with a strong presumption that trial counsel is effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." Strickland, 466 U.S. 693. "In doing so, 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." State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006).

The first area raised by the defense is that the severance should have been granted because Dr. Stirling's testimony was extremely prejudicial to Klinton Vinsonhaler (Appellant Brief of Klinton Vinsonhaler, page 16). Yet, the direct and cross-examination of Dr. Stirling in front of the jury did not demonstrate, at any time, that he was

discussing any activity by Klinton Vinsonhaler. In fact, the child only talked to Dr. Stirling about the older of the two (Kyle Vinsonhaler) and the one that had gone down the path with her. There is no mention of Klinton Vinsonhaler in his testimony.

This defendant also claims that if the trial attorney had requested a severance of the defendants, that it would have been granted. The State submits that there is no logical reasoning to support that type of contention. It is interesting to note that when making this argument that the court would have granted the severance, that it again relates to the testimony of Dr. Stirling. Yet as indicated, Dr. Stirling does not inculcate or mention this particular defendant. As noted in State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982), the defendant would have to establish that a joint trial would be so prejudicial as to outweigh the concerns of judicial economy. The State submits that there is not justification or reason to believe that the court would sever these defendants or that it was ever even contemplated by the court in the first place.

The next claim of ineffective assistance deals again with Dr. Stirling's testimony and that trial counsel should have requested a limiting instruction. Yet, as previously indicated, he never mentions this defendant so the question becomes why would you need a limiting instruction. Also, the jury was properly instructed on how they were to consider the

evidence. In the Court's Instructions to the Jury (CP 71) Instruction No. 3 reads as follows:

A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to any other defendant.

Court's Instructions to the Jury, Instruction No. 3 (CP 71).

The next concern raised by this defendant is that there was ineffective assistance of counsel because trial counsel did not impeach or attempt to impeach the complaining witness. State submits that this is the difficult one for the defense to support because you are dealing with cross-examination of a small child in front of a jury and the potential for backlash by the jury if they feel that the attorney's are being unfair to the child. It is of note that the two trial attorneys in this case were both extremely experienced trial attorneys and neither one of them felt it appropriate to try to impeach this little girl in the manner suggested in this defendant's brief.

Trial counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). It has been indicated in the past "However, even a lame cross-examination will

seldom, if ever, amount to a sixth amendment violation.” Henderson v. Norris, 118 F. 3d 1283, 1287 (8<sup>th</sup> Cir. 1997).

The final example of ineffective assistance of counsel is a claim that the defense attorney should have objected to closing argument by the State when there was a mischaracterization of some of the testimony from a ten year old. Trial counsel, rather than objecting at the time, decided to attack it in her closing argument. Her response in closing argument was as follows:

Now, you have to rely on your collective memory of what is said in the case. But, one of the things the State put forth- when you look back at this bike ride- is that Adrian said that Klinton went down the path where Cami was. I would submit to you my recollection is that he never saw Klinton go down the path or go anywhere near Cami on that bicycle ride.

(January 10, 2007, RP 536, L. 13 – 19).

Because trial strategies and techniques may vary among lawyers, a defense attorney’s decision constituting a trial tactic or strategy or approach to the evidence or argument will not support a claim of ineffective assistance of counsel. In Re Personal Restraint of Benn, 134 Wn.2d 868, 888, 952 P.2d 116 (1998). Only when defense counsel’s conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel’s

performance be considered inadequate. State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978). The absence of a motion for mistrial at the time of the argument strongly suggests to the appellate court that the argument or event in question did not appear critically prejudicial to the defendant in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 792 P.2d 610 (1990).

This becomes obvious when the entire closing argument by the trial attorney for Klinton Vinsonhaler is examined. Her primary emphasis is that the claims against Klinton Vinsonhaler did not arise when she initially discussed these matters with any of the people she felt most comfortable with. The claims against this defendant only arose at the time when she went to see Detective Steve Norton. (January 10, 2007, RP 535 – 536). Further, trial counsel was also drawing the jury's attention to the fact that the disclosures did not take place for at least six months after the event (January 10, 2007, RP 535).

The State submits that these examples show that there was an overall strategy being used by the defense attorney to undermine the credibility of the child without necessarily trying to roughly impeach her in front of a jury. There is a tactical and strategic justification for what she did at trial, and because of that, the claim of ineffective assistance of counsel should fail.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 2 (KLINTON VINSONHALER ONLY)

The second assignment of error raised by the defendant, Klinton Vinsonhaler, only deals with a claim that there was insufficient evidence produced at the time of trial to convict him of Child Molestation in the First Degree.

The standard of review for a sufficiency of the evidence claim is whether, after viewing evidence in the light most favorable to the State, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Smith, 155 Wn.2d 501; Salinas, 119 Wn.2d 201. The Appellate Court will reverse a conviction for insufficient evidence only where no rational trier of fact can find that all elements of the crime are proved beyond a reasonable doubt. Smith, 155 Wn.2d 501; Salinas, 119 Wn.2d 201. The Appellate Court will defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005). Put another way, credibility determinations are for the trier of fact and are not subject to review in the

appellate system. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); Jackson, 129 Wn. App. 109.

Instruction No. 13 of the Court's Instructions to the Jury (CP 71) sets forth the elements of Child Molestation in the First Degree that had to be proven beyond a reasonable doubt. They are as follows:

Instruction No. 13

To convict the defendant of the crime of child molestation in the first degree as charged in count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or between June 1, 2005 and August 31, 2005, the defendant had sexual contact with C.P.T.;
- (2) That C.P.T. was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That C.P.T. was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Court's Instructions to the Jury, Instruction No. 13 (CP 71)

To establish the elements of the crime for the jury the State called, among other witness, Detective Steve Norton from the Child Abuse Intervention Center. Officer Norton had an opportunity to talk to the

complaining witness in this case. In fact, his testimony was allowable under RCW 9A.44.120. The court entered Findings of Fact and Conclusions of Law on Competency and RCW 9A.44.120 hearing (CP 35) on January 4, 2007, after the hearing which was conducted on December 21, 2006. The child talked to the officer in terms of the two brothers (Kyle and Klinton Vinsonhaler) and referred to them as the larger or older one and the younger one. His testimony was as follows concerning Klinton Vinsonhaler:

- Q. (Deputy Prosecuting Attorney) So what was your next question?
- A. (Detective Norton) Her grandmother gave them water bottles and they all went down in the wooded area. She's indicated to me that the big guy had wanted to take a bathroom break, so they all stopped.
- Q. And what happened then?
- A. She informed me that her little brother, Loray, went over to - - her little brother and Loray went over to one area with the brother and the smaller of the two, and the bigger one followed her.
- Q. I'm sorry, could you - - there was a - I couldn't catch that last sentence.
- A. Okay, Her little brother and Loray went over to one area with the brother - - the smaller of the two brothers, and the bigger one followed her.
- Q. I see. Did she say what happened then?

A. The big guy stood there while she went potty, and she advised me that when she goes pee it takes her a long time. And when she got done, the big one asked if he could touch her to see if she was dry. She said okay, at which time he touched her vagina. She advised me that she had her pants and panties still down, and when he touched her, he touched inside too far and it hurt. And she told him to stop.

Q. Did she say anything more about the incident?

A. She informed me that the little brother was there by then, the littler of the two brothers, and asked to check her. And he just touched the outside of her private part.

Q. Did you ask where the little brother and Loray were during the time period of this touching?

A. I did. And she informed me that they were up at the top of the hill and were no where near her and the other boys.

Q. Did she indicate whether the brothers had said anything as they touched her?

A. I asked her specifically if anything had been said, and she advised me that nothing was.

Q. Did she indicate anything more about the touching?

A. I asked her if they had seen each other doing it to her, and she informed me that they had.

(January 9, 2007, RP 282, L. 1 – 283, L. 17)

The jury also heard from the complaining witness in the case. She testified concerning the activities of Klinton Vinsonhaler as follows:

Q. (Deputy Prosecuting Attorney) So what happened after you went pee?

A. (Complaining Witness, C.P.T.) I got touched.

Q. And who touched you?

A. Both.

Q. Both?

A. Yes.

Q. Well, let's start with the first one. What happened - who was the first one that touched you?

A. Kyle.

Q. Now, was that after you finished peeing or before?

A. After.

Q. Did he say anything?

A. He wanted to see if I was dry.

Q. Is that what he said.

A. He said, "Can I see if you are dry?"

Q. And what did he do?

A. He put his fingers up inside.

Q. Inside of what?

A. My front.

Q. Your front? You mean the part where you go pee?

A. Yes.

- Q. Did it - - now, there's an outside and an inside to a girl's part where they go pee. So what part of Kyle touched the part where you go pee? What part of Kyle's body touched the part where you go pee?
- A. Fingers.
- Q. Fingers? And as I said, there's an inside and an outside. So did Kyle touch on just the outside?
- A. The inside.
- Q. How do you know it was inside.
- A. Because it hurt.
- Q. Did you say anything?
- A. I said "Ouch."
- Q. And what did he do?
- A. He stopped.
- Q. Now, you said that they both did something. Where did Klinton come from?
- A. The top of the hill.
- Q. Was he there when you first started to go pee?
- A. No.
- Q. Do you know when he got there?
- A. After Kyle had already touched me.
- Q. Were your pants and underpants still down, or were they up?

A. They were still down.

Q. And what did the other boy, Klinton, say if anything?

A. Nothing.

Q. He didn't say anything? What did he do?

A. He touched me, but not - - he touched me, but on the outside.

Q. He touched your private on the outside?

A. Yes.

Q. Now, did he go inside like Kyle?

MS. CLARK: Objection, leading.

MR. FARR: I'll rephrase.

Q. (By Mr. Farr) Did he do the same thing Kyle did?

A. No.

MS. CLARK: Objection, leading.

THE COURT: Overruled

Q. (By Mr. Farr) What did you say?

A. He - - no, he didn't do the same thing that Kyle did.

Q. I'm sorry. I can't hear you.

A. He didn't do the same thing that Kyle did.

Q. How was it different?

A. Kyle went in, Klinton went out.

- Q. I see. Did you say anything to them - - to Klinton and Kyle?
- A. I told "Ow" to Kyle and nothing to Klinton.
- Q. You didn't say anything to him? So how did it stop?
- A. I took a little step away.
- Q. And did they stop, too?
- A. Yes.
- Q. What did you do after they stopped?
- A. Pulled up my pants and went up the hill.
- Q. Do you know if they - - if the boys could see each other when they were touching you?
- A. Klinton.
- Q. Klinton what?
- A. I think he was there when Kyle was pulling out - pulling -
- Q. Pulling out?
- A. Pulling his fingers out. Then Klinton came down.
- Q. So were they both there when Klinton touched you?
- A. Yes.
- Q. So you pulled up your pants?
- A. Yes.

Q. What did you do then?

A. Went up the hill and continued our bike ride.

(January 10, 2007, RP 385 L. 3 – 388, L. 23)

The parties had entered into a stipulation as to the dates of birth of the two defendants (CP70) and the child had discussed and talked about her age. Clearly there was a difference there of at least 36 months. Further, that she was not married to either of the defendants. The area where the activity took place occurred in the State of Washington.

The State submits that there was ample evidence and information for the jury to arrive at the conclusion that the defendant had committed the crime of Child Molestation in the First Degree.

#### VII. CONCLUSION

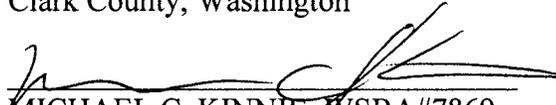
The trial court should be affirmed in all respects.

DATED this 3 day of March, 2008.

Respectfully submitted:

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