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COURT OF APPEALS
DIVISION II

NO. 37047-6-II

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

STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON, Respondent

v.

SAMUEL ROBERT ENGLISH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER A. BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO. 98-1-01646-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

Because of the nature of the issues raised in this appeal, the necessary facts will be set forth in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court prevented the defense from raising relevant exculpatory evidence through the use of an expert. The defendant, in his appellant brief, maintains two areas where the court improperly prohibited testimony from Dr. Jerry Larsen. The claim found on page 15 of the Brief of Appellant, is that the trial court committed error by not allowing the doctor to discuss with the jury the following:

(1) It precluded the defendant's expert from testifying concerning the defendant's claim that his voluntary intoxication had prevented him from forming the requisite intent to commit a crime;

(2) When it precluded the defendant's expert from testifying concerning defendant's sexual normalcy.

To put the court's rulings after an offer of proof into context it is necessary to discuss what evidence the jury actually had concerning the defendant's intent on the evening in question. The only person who is in a

position to testify concerning that was the defendant. He testified for the jury and indicated, just as he had to the police, that he had no memory of the events that occurred in the room with the little girl.

QUESTION (Attorney for Defendant): Okay. All right. What was your first actual awareness of the incident of --?

ANSWER (Defendant): I just remember that the little girl saying, "Get out or I'll scream" or something, I'm not sure exactly what she said.

QUESTION: Okay. And when you heard her say that, did you know where you were?

ANSWER: No, I didn't.

QUESTION: Did you know how you got there?

ANSWER: No, I didn't.

QUESTION: What was your first thought?

ANSWER: Kinda shocked me and scared me.

QUESTION: Okay. Do you remember ever rubbing the little girl's back?

ANSWER: No.

QUESTION: So after you were shocked and scared, do you remember what you did then?

ANSWER: I left the room immediately.

QUESTION: Where did you go?

ANSWER: Outside.

QUESTION: And when you got outside, what did you do?

ANSWER: I'm not really sure.

QUESTION: Not really sure. Do you remember being barefoot?

ANSWER: I don't remember being barefoot, but I - - I do remember talking to George at the door - -

QUESTION: Okay.

ANSWER: - - sliding door.

QUESTION: Okay. And what did you tell George in that moment?

ANSWER: I told him that I saw somebody running - - running from the house.

QUESTION: Okay. And was that true or was that a lie?

ANSWER: It was a lie.

QUESTION: So why did you make up that story?

ANSWER: I was scared and I didn't really know what was going on. Shock or something.

(RP 468, L16 – 470, L1)

There is absolutely no evidence in this record from any source whatsoever that indicates that the defendant told anyone that he did not have a sexual intent with the child that evening. All he has ever maintained with the police and when testifying for the jury was that he had no recollection of the event. Dr. Larsen, then, discussed with the jury the

question of blackout. With this background in mind, it is important now to look at the offer of proof made by Dr. Larsen and what the defense was trying to accomplish.

During the trial, the court broke for the purposes of an offer of proof to be made by the defense before calling Dr. Jerry Larsen as an expert in their case. The state had brought a motion to exclude his testimony and the court needed some clarification from the defense as to what they wanted Dr. Larsen to testify to. (RP 400-401). The defense attorney first informed the court that they wanted him to talk about the affects of alcohol and the concept of blackouts. (RP 401). She also indicated that he had done some psychological testing of the defendant and that based on his evaluation of the defendant's self-reporting, review of police reports, and witness statements, the doctor was willing to give a diagnosis of episodic alcohol abuse, episodic alcohol intoxication with memory loss. (RP 402).

The court also questioned the defense attorney about whether or not he was diagnosing the defendant as not being a pedophile. The colloquy with the defense attorney went as follows:

THE COURT: I think he's diagnosed that he's not a pedophile; right?

MS. SMITH-EVANSEN (Defense Attorney): I don't - - I don't - - I don't - -

THE COURT: And therefore he probably didn't commit the crime. I mean, that - -

MS. SMITH-EVANSEN: I think that would be a conclusory - -, and I don't think he'd be able to testify to that.

THE COURT: Okay. So you're not intending to elicit any such testimony; is that right?

MS. SMITH-EVANSEN: Not regarding the pedophile. There are some of his tests that he do (sic), the MMPI has a certain portion of it, that tests the person's - - I believe it's their sexual normalcy and - -

THE COURT: Okay.

MS. SMITH-EVANSEN: - - his report, self-report, put him in the normal ranges.

THE COURT: And you want to put that into evidence?

MS. SMITH-EVANSEN: Yes.

THE COURT: Why?

MS. SMITH-EVANSEN: Because he's been accused of Child Molestation in the First Degree.

THE COURT: So his sexual normalcy - -

MS. SMITH-EVANSEN: Yeah.

THE COURT: - - and his self-report, then, would be offered as evidence to prove that he didn't commit the crime?

MS. SMITH-EVANSEN: It would support the defendant's
--

THE COURT: Well, is it offered to prove he didn't
commit the crime?

MS. SMITH-EVANSEN: No.

THE COURT: What's it offered to prove, then?

MS. SMITH-EVANSEN: To support his testimony - -

THE COURT: That he didn't commit the crime?

MS. SMITH-EVANSEN: That - - that he didn't commit
the crime.

THE COURT: Yeah, that's totally inadmissible.

MS. SMITH-EVANSEN: Your Honor, we believe it's
relevant.

THE COURT: I believe it isn't. I believe it's inadmissible.

So I want to hear from Dr. Larsen, then, on the
alcohol-related testimony and not any of this personality
testing that would show he's not likely to commit this kind
of crime. That evidence has never been admissible in any
court.

THE COURT: So have him come up.
(RP 403, L10 – 405, L10)

The actual offer of proof from the doctor runs from RP 405 to 424.
He discusses in detail with the court the affects of alcohol as it relates to
blackout and fragmentary memory loss. (RP414-415). And the opinion
that was asked during the offer of proof was whether or not the

defendant's version of events was consistent with an alcoholic blackout.

(RP 415). The doctor indicated that it was consistent with an alcohol intoxication and blackout with fragmentary memory loss.

During cross examination of the doctor, he was asked specifically about whether or not he had any opinions about the defendant's intent on the evening in question.

QUESTION (Deputy Prosecutor): Would you concede that a claim of an inability to remember is a common experience when individuals that have had alcohol use to excuse away criminal behavior?

ANSWER (Dr. Jerry Larsen): Yes, sir.

QUESTION: Absent his self-report, you have no scientific basis to confirm he was in a blackout on that date.

ANSWER: Correct.

QUESTION: Do you have any scientific evidence, generally accepted in the community of the field in which you operate, on the ability to discern when an individual has an inability to form intent based upon alcoholic consumption?

ANSWER: In this case?

QUESTION: Yes.

ANSWER: No.

QUESTION: I'm going to show you what's - - what is the actual - - can you read that (indicating)? I'm sorry, I'll bring it up closer. That's a little small, I'm sorry. That's the

definition of "intent" that the jury will receive in trying to discern whether an individual in this criminal case acted intentionally.

ANSWER: Yes.

QUESTION: Is your scientific testimony, your - - your professional testimony, that this individual on this occasion did not have the intent?

ANSWER: No. There's no way I can know that.
(RP 419, L13 - 420, L13)

After hearing the offer of proof that was made, the court made its ruling:

THE COURT:...The blackouts aren't something that the defendant made up when he got back here for trial, he mentioned blackout to the police the very night that he was first contacted.

The effect and significance of a blackout is not to rebut or present an inability to formulate intent - - that's clear from the evidence I heard today here - - but to explain why the defendant would have limited memory of the events.

The blackouts are the product of apparently some interference with the hippocampus such that memories are not imprinted on the brain, they're just not collected and not preserved because of the effect of the alcohol.

So - - and it's clear that the defendant wishes to testify, I've heard that all through the case, and he wants - - and I believe he'll be testifying that he has no memory of going into the room and - - he remembers being in the room, I think he'll testify to that, at least he's told other people that, but no memory of going in, unplugging the

Expert evidence is helpful if it concerns matters beyond the common knowledge of the layperson and does not mislead the Jury. State v. Jones, 59 Wn. App. 744, 750, 801 P.2d 263 (1990). While opinion testimony need not be excluded merely because it encompasses an ultimate issue of fact, State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), no witness may testify, either directly or by inference, as to the defendant's guilt. State v. Black, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987). Neither may an expert usurp the jury's role to weigh the evidence and determine credibility. State v. Jones, 59 Wn. App. 749; State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). And obviously, the expert must have some belief in the truthfulness of an opinion and feel comfortable in rendering it and that it has the requisite underpinnings from the evidence to support an opinion even if it goes to an ultimate fact. Opinion testimony may not be excluded under ER 704 on the basis that it encompasses ultimate issues of fact. However, it must be otherwise admissible and is therefore subject to the requirements of ER 403, ER 701, and ER 702. State v. Jones, 59 Wn. App. 750; State v. Allen, 50 Wn. App. 412, 417, 749 P.2d 702 (1988). An opinion which lacks proper foundation or is not helpful to the trier of fact is not admissible under ER 701 or 702. An otherwise admissible opinion may be excluded under ER

light, reaching under the covers, reaching under the girl's shirt, rubbing her back for an extended period of time.

And in order for the jury to put that testimony into context rather than just conclude, Oh, he must be lying when he says he can't remember, Dr. Larsen's testimony helps the jury to determine that, yes, in fact, there's a reason why he couldn't remember and from that the jury could conclude it's very - - it could be more likely that he, in fact, is not lying when he says he can't remember, but he can't'.

So Dr. Larsen will be allowed to testify as to his theory on blackouts, on his knowledge on blackouts, rather; his application of that knowledge to this case.

The testimony as to diminished capacity, however, I don't think meets the evidentiary standard and will not be permitted.

(RP 429, L13 – 431, L2)

From the offer of proof it is obvious that the doctor was never in a position to discuss with the jury the defendant's intent on the evening in question. Diminished capacity was not established through this witness, nor was it even attempted. The relevance of his expert testimony dealt with explaining why the man could not remember certain events that evening. The doctor was never in a position to testify about the defendant's ability to form a specific intent. It's obvious from his discussion at the offer of proof that he did not feel comfortable discussing this.

403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value.

As previously discussed above, there is no basis for Dr. Larsen to be able to testify about intent because that was not what he was looking at as the primary issue in the case. There was no proper foundation laid to allow this type of information to go to the jury. In that regard, the trial court is accorded broad discretion to determine the admissibility of ultimate issue testimony, State v. Jones, 59 Wn. App. 751; City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Another way of looking at the opinions of Dr. Larsen is that his offer of proof clearly indicates that he is taking most of the information from self-reporting by the defendant. An expert's opinion on an ultimate issue of fact that is based solely on the expert's perception of a witness's truthfulness is unfairly prejudicial and thus inadmissible because it takes an ultimate issue of fact from the jury. State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992); State v. Black, 109 Wn. 2d 336, 348-349, 745 P.2d 12 (1987); State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994).

The trial court also made specific rulings about the lack of diminished capacity defense in this case and did not instruct on it. Evidence offered to prove diminished capacity is subject to the usual rules

of evidence, including those on relevance, expert witnesses, and unfair prejudice. State v. Atsbeha, 142 Wn. 2d 904, 917, 16 P.3d 626 (2001). The testimony must refer to the defendant's mental condition at or close to the time the witness made the observation and at or close to the time the offense at issue occurred. State v. Smith, 16 Wn. App. 300, 302, 555 P.2d 431 (1976). As with other evidentiary rulings, these are reviewed for abuse of discretion by the trial court. State v. Atsbeha, 142 Wn. 2d 913-914.

The state submits that, based on the doctor's testimony at the offer of proof, it is obvious that his relevant testimony was limited to the question of blackout and partial memory loss as a result of the alcohol. There was no basis presented for any other type of testimony and the trial court properly ruled that those other matters should be excluded. There simply was no foundation laid to establish any of the factors that the defendant in the appellant's brief is trying to raise.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel. In the brief of appellant there are three

instances noted where the claim is that the defense attorney was ineffective.

(1) George Riddle's testimony that the defendant had committed a crime,

(2) Officer Norton's testimony that he was assigned to this case because he worked as part of the Child Abuse Intervention Center, and

(3) Officer Norton's testimony that he gave the defendant a Miranda warning along with testimony of what those Miranda warnings were.

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 140 L. Ed. 2d 323, 118 S. Ct. 1193 (1998). Prejudice occurs when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, counsel's deficiencies must have

adversely affected the defendant's right to a fair trial to an extent that "undermine[s] confidence in the outcome." State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996); State v. Horton, 116 Wn. App. 909, 922, 68 P.3d 1145 (2003) (quoting Strickland, 466 U.S. at 694).

When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). The Court presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). The Appellate Court accords deference to counsel's performance in order to "eliminate the distorting effects of hindsight" and, therefore, the Court presumes reasonable performance. Strickland, 466 U.S. at 689; State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001), aff'd, 147 Wn.2d 515, 55 P.3d 609 (2002). A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-

78, 917 P.2d 563 (1996); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

The defense in this case was that the defendant suffered from an alcoholic blackout and didn't remember the matter that he was charged with. However, the defense also wanted to make it clear to the jury that the defendant was cooperative and willing to assist. The first instance of claimed ineffective assistance of counsel dealt with testimony from George Riddle concerning taking the defendant from the residence and while going to the defendant's truck, Mr. Riddle decided to report it to law enforcement. The brief of appellant sets forth a small portion of the actual testimony that dealt with this and totally disregards the cross examination. The discussion that Mr. Riddle had with the defendant and the circumstances surrounding this was as follows:

ANSWER (George Riddle): At that point I said, "You have to leave my house." So he packed up his stuff and we left the house in my truck.

QUESTION (Deputy Prosecutor): Were you going to go take him back to his vehicle?

ANSWER: I was gonna take him back to Exit 14, back to his truck.

QUESTION: As you were going back to his truck on Exit 14, well, did you do anything before you got to his truck?

ANSWER: Yes. As I was driving, I realized that I had to do something, a crime had been committed, so I said, "Well, I could go to the police." And he said, "Do that, so they could take some fingerprints or whatever" to show that he was innocent.

QUESTION: All right.

ANSWER: So I proceeded along 199th, we saw two police cars, one was a sheriff and the other was a Battle Ground police, and they had stopped a car for something or other.

So I proceeded to Battle Ground police office. And discovered that that was - - nobody was on duty, it was all locked up.

So we went back to the truck, and on the way back to the truck, he said, "Why don't you just drive me back to Exit 14 and you'll never see me again."

Well, I really knew at that point I really had to get the police. So I said, "No, I think we'll just go back to the two patrol cars, see if they're there."

(RP327, L14 – 328, L15)

This area was again addressed in some detail on cross examination of Mr. Riddle. That question and answer went as follows:

QUESTION (Defense Attorney): And on the way back, you were taking him to his truck at that point when you initially set off, but on the way you decided that you'd possibly go to the sheriff's office? The police office?

ANSWER (George Riddle): Yeah, it - - on the way, I realized that I had to talk to some authority.

QUESTION: Because you were getting mad.

ANSWER: Well, I wasn't getting mad at that point, I was -
- I was - - I knew that if I send him back or just took him
back to his truck, he'd be gone, and I couldn't let that
happen.

QUESTION: Okay.

ANSWER: But I didn't know how Robert was gonna react
to that, so I said I could go to the - - to the sheriff.

QUESTION: And he agreed at that point.

ANSWER: And he agreed, and that he thought that was a
good idea because he - - they could take fingerprints and
whatever they did, presumably to satisfy this person (sic)
that supposedly ran across our driveway.

QUESTION: Now when you first - - the first time you
drove by the police officers, did he suggest you should stop
(inaudible)?

ANSWER: No.

QUESTION: No?

ANSWER: No. It was basically my call. I was heading for
the Battle Ground police station, because I had no idea
there was going to be any officers en route, but it so
happened that there was, and they had stopped a car, lights
were flashing, so I felt it was just around the corner, a block
down, and it would be the police station.

But didn't even know that Battle Ground police
closed up at night.

QUESTION: Okay. You get out of the car and you went
up to the police station - -

ANSWER: I opened the door, yep.

QUESTION: And Robert wasn't trying to run at that point.

ANSWER: No.

QUESTION: Okay. He got back in the car with you and went back to the other officers.

ANSWER: He wanted me to drive him back to his truck and never see him again.

QUESTION: Right. But you went ahead and took him back to the officers on the - -

ANSWER: I did - -

QUESTION: - - side of the road?

ANSWER: - - yes, I said No, we're gonna go back and talk to those two patrolmen if they're still there.

(RP339, L 19 - 341, L16)

The state submits that there is absolutely nothing wrong with this testimony. This was not an opinion as to guilt or innocence of the defendant, but merely explaining the thought process of Mr. Riddle and how the defendant was reacting to this. It inured to the benefit of the defendant and was used on cross examination to show that the defendant was being cooperative.

This also applies to the other two areas of claimed ineffective assistance of counsel dealing with the defendant talking to Officer Steve Norton. During the defendant's testimony he was trying to make it quite clear to the jury that he was cooperative throughout and was willing to talk

to the officers concerning what he recalled of that evening. The designation of the officer, where he worked, and the giving of Miranda rights were immaterial to the defense at that point because their approach (the trial tactics) dealt more with the fact that the defendant was coming forward to talk about this with the officers. Even after being advised of Miranda he still wanted to talk to the officers concerning this. The state submits that this is a sound trial tactic.

QUESTION (Defense attorney): Okay. Do you remember calling officers in Vancouver later, after that from - - let's see, if I can just finish - - make a question for you.

Do you remember calling police officers I Vancouver on another date after that?

ANSWER (Defendant): I don't really remember calling them, but I remember meeting them here.

QUESTION: Okay. And did you come down voluntarily?

ANSWER: Yes.

QUESTION: And how - - how did you come down?

ANSWER: My sister drove me.

QUESTION: You drove with your sister.

ANSWER: (No audible response.)

QUESTION: At that point what did you think was going to happen?

ANSWER: I was just gonna go and talk to them and that would be the end of it.

QUESTION: Did you think you'd be arrested?

ANSWER: No.

QUESTION: Were you arrested?

ANSWER: (No audible response).

QUESTION: Did you tell them the truth?

ANSWER: Yes, I did.

QUESTION: Did you tell them that you'd made up a lie about this unknown man?

ANSWER: Yes, I did.

QUESTION: Did you tell them that you have a drinking problem?

ANSWER: (No audible response).

QUESTION: Did you tell them that you had a history of alcoholic blackout?

ANSWER: (No audible response).

QUESTION: Did you tell them about finding yourself in places you couldn't recall?

ANSWER: I don't think I told them that.

QUESTION: Okay.

ANSWER: I can't really remember.

QUESTION: Okay. Now, when you drove down and talked to them voluntarily, did - - did you ever think that

they would accuse - - that you would be charged with attempted child molestation?

ANSWER: No.

QUESTION: In the first degree?

ANSWER: No. I didn't even consider it.
(RP 471, L18 – 473, L11)

As the case law clearly indicates there is a presumption of reasonable performance by a defense attorney. Different attorneys may approach the facts in different ways and have different opinions as to an appropriate way to handle the case. It does not mean, however, that there is only one way it can be done. There is absolutely nothing in these examples given in the Brief of Appellant that would undermine the confidence in the jury's decision in this case. Nor has counsel on appeal provided any case law indicating that any of these areas of concern would be the type that would constitute reversible error. This is especially true in a situation where the defense attorney at trial was attempting to put the defendant in the best light possible. The decision of when or whether to object is an example of trial tactics. Case law is clear on that. There is absolutely nothing to indicate in this record that the defense attorney at trial did anything inappropriate.

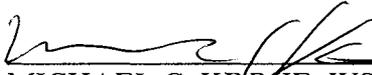
IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 2 day of Sept, 2008.

Respectfully submitted:

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