

NO. 47282-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES ROWLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Appellant assigns error the 2008 findings of fact.
2. Appellant assigns error the 2008 conclusions of law.
3. Appellant assigns error the trial court's reliance on the 2008 findings and conclusions to permit the trial court to avoid a new child hearsay hearing.
4. The trial court erred by relying on the "law of the case" doctrine to permit reliance on the 2008 child hearsay findings.
5. Appellant was denied effective assistance of counsel.
6. Appellant was denied his right to a fair trial.
7. The child hearsay was inadmissible under RCW 9A.44.120.

Issues Pertaining to Assignments of Error

1. Was appellant denied effective assistance of counsel by counsel's failure to provide authority for suppressing child hearsay?
2. Was appellant denied effective assistance of counsel by counsel's failure to move for a mistrial after appellant's mother implied that he was a repeat child molester?
3. Was appellant denied his right to a trial?
4. Was the child hearsay inadmissible under RCW 9A.44.120?

5. Did the trial court abuse its discretion by believing that it could not exercise its discretion regarding admission of child hearsay from 2008?
6. Did the trial court abuse its discretion by misapplying the law regarding child hearsay?

B. STATEMENT OF THE CASE

This Court reversed Mr. Rowley's prior conviction for child molestation and remanded for a new trial. (Unpublished Opinion *In re PRP of Rowley*, 179 Wn. App. 1055, at p. 5) COA 71367-1-1). Division One provided: "Rowley's personal restraint petition is granted and his case remanded to the superior court with orders to vacate Rowley's conviction and conduct any further necessary proceedings, consistent with this opinion." *Id.*

During trial, the complainant (A.R.) testified that during the night, in a room without a light, she saw a man under a blanket she said was Rowley. RP 402-06. A.R. testified that Rowley touched her private parts. RP 393. A.R.'s cousin Wyatt Tegman testified that he saw the silhouette of a man with spikey hair who he believed was Rowley. RP 138-149.

a. Child Hearsay.

The court permitted A.R.'s grandmother to repeat that A.R. said Rowley touched her. RP 17-0-71. Dr. Joseph Hoffman also testified that A.R. told him that Rowley touched her "bottom". RP 261-64. Sexual assault nurse Nancy Young also testified that Rowley touched her. RP 270.

Detective Paul Pittman conducted a child interview and testified to the same as recounted by A.R. RP 418-19. There was no physical evidence of molestation. RP 265, 275.

Defense counsel argued to the court that because A.R. (complainant) was sixteen¹ at the time of trial, child hearsay was no longer relevant and therefore inadmissible and should be suppressed. RP 44. Inconsistently, counsel also stated that she agreed that the law of the case applied to the determination of the admissibility of child hearsay. *Id.* The judge did not make a ruling at that time. Later in the proceedings, the trial court discussed the law of the case, but again did not make a ruling. RP 100-01.

Later during the proceedings, defense acknowledged that the trial court ruled on the child hearsay issue but raised her concern that the court should conduct a hearing pursuant to *State v. Hopkins*, 137

¹ Defense counsel mistakenly noted A.R. as 17 years old.

Wn.App.441. 154. P.3d 250 (2009). The court responded that it reviewed *Hopkins* and requested additional legal authorities from the parties but did not receive any. The trial court decided to continue to reserve ruling on the child hearsay issue. RP 127. Defense again raised the issue related to admission of the video of the child interview and again the court responded that it had invited the parties to provide authority. RP 239. Defense counsel later argued that the child hearsay was not inadmissible under RCW 9A.44.120 but rather was inadmissible because the prior trial had been vacated. RP 240-43, 245-46.

Trial Court Ruling On Child Hearsay

THE COURT: Okay. Well, the issue for the Court is whether or not initially we need another child hearsay hearing at this time, and in cases where matters have been litigated and the Court of Appeals has made a decision on something and set a rule, generally it's called law of the case and that doesn't get disturbed. The issue here today is we had a child hearsay hearing back in 2008, a full hearing. The statements were deemed to be admissible. It was not challenged on appeal, and then now we are in a second trial and in the second trial, assume for the sake of argument hypothetically that Mr. Rowley is convicted and then appeals, can he appeal the issues that he didn't appeal in the first trial? And the answer to that is yes, he can.

At this time, however, we're talking about a piece of evidence that the court, that has already been, that

part of it the Court can review because the Court can go ahead and look back at - can go look at the interview and make a determination. But a child - in a child hearsay - in looking at what evidence is - pardon me for not finishing my thought there, folks. In making a decision as to whether or not particular statements are admissible under the child hearsay statute the Court hears, in many instances, also from the child. And in this particular case the Court heard from - would hear from the child as well as hear those statements and then make a decision whether or not the Ryan factors, for lack of using a better term, were satisfied.

Obviously, the Court can look at the tape. The young - the child is now a young lady. The Court has been informed that she will in fact testify. The Court would also hear from her again. **She's not a child. So, technically, this Court can't - we can't recreate how - the evidence that was presented back in 2008 because the child's much - because the child's now much older. So, does that prevent the admissibility of the evidence? No,** it doesn't, because if it was to do that you'd have a situation where hearsay evidence that's admissible when children don't testify - in other words, when they're deemed incompetent - could come in in a later trial, that hearsay evidence that was deemed admissible when a child did testify in a later trial would then be not admissible - pardon me - in an earlier trial would not be admissible in a later trial. And the Court doesn't read the criminal rules as setting up that type of absurd situation.

So, what this Court will do is the Court can review the tape, and this Court can do that. The Court will listen to the testimony as the young lady's that comes in in trial, and if there's an objection to the admissibility of the tape we can address it at that point. And I'm getting a quizzical look from Mr. Dorcy, and I think I'm stopping.

(Emphasis added) RP 246-48.

Without objection, Rowley's mother stated that she knew that Rowley was a repeat child molester. RP 180. "I love my son. I don't like what he does, you know, but I also love my grandchildren. It was a mess." RP 180.

C. ARGUMENTS

1. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO EXERCISE ITS DISCRETION AND BY MISAPPLYING THE LAW REGARDING THE ADMISSIBILITY OF CHILD HEARSAY EIGHT YEARS AFTER THE INCIDENT.

This Court reversed Mr. Rowley's prior conviction and remanded for a new trial. (Unpublished Opinion *In re PRP of Rowley*, 179 Wn .App. 1055, at p. 5) COA 71367-1-1). Division One provided: **"Rowley's personal restraint petition is granted and his case remanded to the superior court with orders to vacate Rowley's conviction and conduct any further necessary proceedings, consistent with this opinion."** Id. (Emphasis added). The trial court did not engage in an ER 403 analysis during the second trial regarding child hearsay.

a. Refusal To Exercise Discretion Is An Abuse of Discretion.

A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds. *State v. Beadle*, 173 Wn.2d 97, 112, 265 P.3d 863 (2011). The trial court's refusal to exercise its discretion to address the child hearsay issue was an abuse of discretion because a refusal to exercise discretion is an abuse of discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

A trial court may admit child hearsay statements when it finds that the statements have sufficient indicia of reliability and that the child is available and competent to testify at trial. RCW 9A.44.120.

But such statements are subject to exclusion when the danger of unfair prejudice or the needless presentation of cumulative evidence substantially outweighs their probative value. ER 403; *State v. Bedker*, 74 Wn. App. 87, 93, 871 P.2d 673 (1994).

During the second trial, at issue in this case, the trial court refused to conduct a new child hearsay hearing, believing that the law of the case precluded a new hearing or because the victim was now 16 years old, and such a hearing will be futile. RP 42 (judge

asked prosecutor if “law of case applied²). Defense counsel initially argued that a new child hearsay hearing was necessary and that child hearsay was inadmissible, but when invited by the court to argue this issue in detail, counsel did not follow through. RP 127, 239. The record is a bit convoluted, but the trial court clearly determined that she need not conduct a second child hearsay hearing under the “law of the case” or under any other analysis. RP 246-48.

The trial court discussed the general legal principles involved in child hearsay statements after remand but did not actually analyze this case or exercise discretion. Rather she simply stated that she could not conduct a child hearsay hearing because A.R was a young woman, and if counsel had an issue, she could raise it at a later time. RP 246-48. This was a failure to exercise discretion—an abuse of discretion. *Grayson*, 154 Wn.2d at 342.

² THE COURT And those statements were a part of a child hearsay --
MR. DORCY: Yes.
THE COURT: -- ruling that was not appealed --
MR. DORCY: Correct.
THE COURT: -- and that is because it's, in this particular case was not
appealed is law of the case, and so that is part of the original
transcript?
MR. DORCY: It's part of the original transcript. RP 42.

b. Trial Court Abused Discretion by Misapplying Law.

A sentencing court also abuses its discretion when it misapplies the law. *State v. Cawyer*, 182 Wn.App. 610, 616, 330 P.3d 219 (2014). This Court reviews de novo the choice of law and its application to the facts of the case. *State v. Corona*, 164 Wn.App. 76, 78, 261 P.3d 680 (2011).

RAP 12.2 provides, in part, “The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.” When an appellate court reverses a judgment and makes no final ruling on all the issues in a case, the usual procedure contemplated is a new trial. *State v. Jones*, 148 Wn.2d 719, 722, 62 P.3d 887 (2003). “This is true when it is fairly apparent from the court’s discussion of the case that the cause is remanded with that object in view.” *Jones*, 148 Wn.2d at 722 (quoting, *Elliott v. Peterson*, 92 Wn.2d 586, 588, 599 P.2d 1282 (1979)).

Division One of this court has held that when it remands “for further proceedings” or instruct a trial court to enter judgment “in any lawful manner” consistent with our opinion, “we expect the court to exercise its authority to decide any issue necessary to

resolve the case on remand.” *State v. Schwab*, 134 Wn.App. 635, 645, 141 P.3d 658 (2006), *affd*, 163 Wn.2d 664, 185 P.3d 1151 (2008). Such language does not give the trial court the authority to decide that it may rely on parts of the trial that were vacated. Rather, the trial court must start with a clean slate and provide a new trial. *Jones*, 148 Wn.2d at 722.

Under RAP 12.2, when this Court reverses a conviction and remands for a new trial, the trial court must follow this Court’s directive. RAP 12.2. The decision of the Court of Appeals becomes “binding” on all other courts.

Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court,...

RAP 12.2. When the Court of Appeals expressly “vacate[ed]” Rowley’s conviction, it was apparent from this Court’s 2008 opinion that it was remanding for an entirely new trial.

Our Supreme Court has long held that “[s]uperior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court.” *Schwabe*, 134 Wn. App. at 645; *citing*, *Harp v. Am. Sur. Co.*, 50 Wn.2d 365, 368, 311 P.2d 988

(1957). The lack discretion contemplated by the reviewing court relates to the fact that the trial court must provide a new trial. *Id.*

The lower court may exercise its discretion to resolve a case only when the appellate court remands “for further proceedings,” or instructs a trial court to enter judgment “in any lawful manner” when the trial court’s exercise of discretion **is not inconsistent** with the Court of Appeals mandate.(Emphasis added). *Id.*

This Court remanded to “conduct any further necessary proceedings, consistent with this opinion.” The Court of Appeals reversed for a new trial based on ineffective assistance for failing to raise a public trial violation. *In re PRP of Rowley*, 179 Wn .App. 1055, at p. 5) COA 71367-1-1). The Court of Appels did not address other ineffective assistance of counsel issues and did not expressly retain any rulings from the original trial or leave intact any “law of the case”. Rather the Court of Appeals reversed and vacated for a “new trial”. *Id.* A “new trial” means a “new trial”, not necessarily a second trial with remnants from the first trial. The fact that Rowley’s conviction was reversed for both ineffective assistance of trial and appellate counsel casts significant doubt on the reliability of any of the first trial court’s rulings.

The law of the case doctrine does not preclude review of issues not addressed by the Court of Appeals. *State v. Strauss*, 229 Wn.2d 401, 412-13, 832 P.2d 78 (1992). The trial court did not understand that it retained discretion to address issues not expressly addressed by the former Court of Appeals opinion. *Strauss*, 229 Wn.2d at 413; *State v. Suave*, 33 Wn.App. 181, 183 n. 2, 652 P.2d 967 (1982), aff'd 100 Wn.2d 84, 666 P.2d 894 (1993).

The trial court expressed her understanding that the Court of Appeals could address child hearsay, but due to the age of the child, the trial court could not address this issue. RP 246-48. In *Sauve*, the Court noted that “[t]he trial court may exercise independent judgment as to decisions to which error was *not* assigned in the prior review....” (Italics ours.) *Suave*, 33 Wn.App. at 183 n. 2 (quoting comment to (former RAP 2.5(c)(1)). RAP 2.5(3)(c).

The law of the case doctrine did not preclude the trial court from addressing issues not addressed by the reviewing court. RAP 2.5(3)(c).

RAP 2.5(3)(c) Law of the Case Doctrine Restricted.
The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

Id.

Contrary to the trial court's understanding, nothing in RAP 2.5(3) prohibited the trial court from exercising its discretion. Here, the trial court abused its discretion when it determined that it could not conduct a new child hearsay hearing. RP 246-48.

This Court should reverse and remand for a new trial with direction for the trial court to exercise its discretion regarding the admissibility of child hearsay.

2. INEFFECTIVE ASSISTANCE OF
 COUNSEL DENIED APPELLANT HIS
 RIGHT TO A FAIR TRIAL.

Counsel did not argue that the Court of Appeals opinion

acknowledging ineffective assistance of counsel trial and appellate counsel required the trial court to abandon all prior trial proceeding rulings. Nor did trial counsel argue that the trial court was required to engage in an ER 403 analysis. Counsel also failed to move for a mistrial after Rowley's mother implied that he was a repeat child molester. These failures constitute prejudicial ineffective assistance of counsel.

To prove ineffective assistance of counsel, a defendant must show (1) that counsel's conduct fell below an objective standard of reasonableness; and (2) that this deficient conduct resulted in prejudice to the defendant—that there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would be different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Maynard*, 183 Wn.2d 253, 260, 351 P.3d 159 (2015). "Although courts strongly presume that defense counsel's conduct was not deficient, a defendant rebuts this presumption when no conceivable legitimate tactic exists to explain counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Strickland recognized the Sixth Amendment's guarantee that

“[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense” entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence. *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct.1473, 176 L.Ed.2d 284 (2010) (quoting *Strickland*, 466 U.S. at 688, 694); See also *Hinton v. Alabama*, 571 U.S. —, 134 S.Ct. 1081, 1088, 188 L.Ed.2d 1 (2014) (alterations in original); accord *State v. Henderson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The United States Supreme Court recently characterized the first step of this test as follows:

“The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ “ *Padilla, supra*, at 366 (quoting *Strickland, supra*, at 688). “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland, supra*, at 688.

Hinton, 134 S.Ct. at 1088.

Under *Strickland*, “strategic choices” “are reasonable precisely to the extent that reasonable professional judgments

support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Hinton*, 134 S.Ct. at 1088 (failure to request funds for adequate expert prejudicial ineffective assistance of counsel) (*quoting Strickland*, 466 U.S. at 690-91).

“An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Hinton*, 134 S.Ct. at 1088; *Morris*, 176 Wn.2d at 176 (appellate counsel’s failure to research the public trial issue was deficient performance, because the law was readily available).

a. Trial Counsel Was Ineffective For Failing to Argue That the Admission of Child Hearsay Was Unduly Prejudicial.

In *Bedker*, the Court explained the purpose of admitting child hearsay involving young children:

RCW 9A.44.120 specifically allows the admission of child hearsay under these circumstances. The purpose of the child hearsay statute was set forth by our State

Supreme Court in *State v. Jones*, 112 Wn.2d 488, 493-94, 777 P.2d 496 (1989):

RCW 9A.44.120 is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse. Acts of abuse generally occur in private and in many cases leave no physical evidence. Thus, prosecutors must rely on the testimony of the child victim to make their cases. **Children are often ineffective witnesses, however. Feeling intimidated and confused by courtroom processes, embarrassed at having to describe sexual matters, and uncomfortable in their role as accuser of a defendant who may be a parent, other relative or friend, children often are unable or unwilling to recount the abuses committed on them.** In addition, children's memories of abuse may have dimmed with the passage of time. For these reasons, the admissibility of statements children make outside the courtroom, and especially statements made close in time to the acts of abuse they describe, is crucial to the successful prosecution of many child sex offenses.

See also Joint Hearings on SB 4461 before the Washington State Senate Judiciary Comm. and Washington State House Ethics, Law & Justice Comm., 47th Legislature (Jan. 28, 1982).

(*Emphasis added*) *Bedker*, 74 Wn. App. at 92-93.

The balancing test of ER 403 serves to protect the rights of both the criminal defendant and the child victim. *State v. Pardo*, 596 So.2d 665, 668 (Fla. 1992).

Here, trial counsel was ineffective to Rowley's prejudice because had counsel argued that the child hearsay was prejudicial under ER 403, the trial court likely would have suppressed the evidence. The purpose of the child hearsay is not served when the complainant is an articulate teenage. *Bedker*, 74 Wn.App. at 93.

Had the trial court understood that it was required to hold a new child hearsay hearing, it would have realized that under ER 403, admission of the child hearsay was no longer relevant and unduly prejudicial. Suppression would have changed the dynamic of the trial to the sole testimony of the complainant's version of events in a dark room at night where she could not see the perpetrator's face. Suppression would have, within a reasonable probability, altered the outcome of the trial.

- b. Counsel Was Ineffective For Failing to Move to Strike and Request A Curative Instruction When Rowley's Mother Inferred He Was a Repeat Child Molester.

Trial counsel failed to move to suppress appellant's mother's testimony implying that he was a repeat child molester. "A. I love my son. I don't like what he does, you know, but I also love my grandchildren. It was a mess." RP 180. Where the defendant's ineffective assistance claim is based on it is a failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the **evidence** not been admitted. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1988).

In *Saunders*, this Court reversed Saunders' conviction based on ineffective assistance counsel for failing to object to inadmissible hearsay regarding related drug offenses. This Court held that there was no tactical reason to fail to object, the court would have granted a motion to suppress and the prejudice was undeniable. *Saunders*, 91 Wn.App. at 580-81, (*citing, Strickland*, 466 U.S. at 694; *State v. Hardy*, 133 Wn.2d 701, 712-13, 946 P.2d 1175 (1997)).

Rowley can establish each of these prong too. First, there

was no possible strategic reason not to object to highly prejudicial inadmissible evidence that his mother thought he was a repeat child molester. Second, an objection would have been sustained because there was no legal basis for permitting the mother's opinion. Third, and finally, the result of the trial likely would have differed without the evidence that Rowley's mother thought he was a repeat child molestation offender.

State v. Stith, 71 Wn.App. 14, 856 P.2d 415 (1993), a prosecutorial misconduct case is also instructive on the issue of when a remark is so prejudicial that it cannot be cured with an limiting instruction. *Stith*, 71 Wn.App. at 22-23. In *Stith*, the prosecutor, not a witness, informed the jury that Stith was out dealing drugs again, in a drug trial. *Id.* This Court held that even though, the trial court sustained counsel's objection, the remark was irretrievably prejudicial.

Here, a witness, the defendant's own mother, not the prosecutor, made the offending remarks inferring that Rowley was a known child molester. Here, the mother's comment was so prejudicial, calling her own son a child molester, that no instruction could have cured the damage. Nonetheless, counsel's failure to

object and request a mistrial as reversible error because the remarks could not be cured. *Sauder's, supra; Stith, supra.* Here, Rowley was denied his due process right to a fair trial and to the effective assistance of counsel. The remedy is to remand for a new trial.

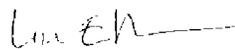
D. CONCLUSION

Mr. Rowley was denied his right to a fair trial and to effective representation. The trial court abused its discretion by failing to exercise discretion and by misapplying the law. Accordingly, this Court should vacate the conviction and judgment and sentence and remand for a new trial.

DATED this 30th day of November 2015

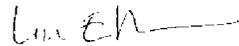
Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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I, Lise Ellner, a person over the age of 18 years of age, served Mason County Prosecutor Appeals timw@co.mason.wa.us and James Rowley DOC# 982733 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed, On November 30, 2015. Service was electronically.



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