

No. 49106-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES OTIS WRIGHT, JR.,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 16-1-00211-34

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Wright's right to a speedy trial, as provided by CrR 3.3, was violated.
2. Whether the State presented sufficient evidence to support the conviction for indecent liberties.
3. Whether Wright received ineffective assistance of counsel.

B. STATEMENT OF THE CASE.

1. Substantive facts.

On February 7, 2016, Tammy Stampfli, the pastor of the United Churches of Olympia, was alone at the church early in the morning preparing for the two worship services which began at 9:00 a.m. and 10:30 a.m. RP 73-74.¹ At approximately 7:40 a.m., she was in the church office; the outer doors were locked. The doorbell rang. RP 74. Stampfli opened the door to find James Otis Wright there. RP 74-75. Stampfli was acquainted with Wright, who had attended services at the church since sometime in 2015. He often stayed for the coffee hour after the services, remaining until the church closed. RP 75. Wright often came to the church on days other than Sunday, when the church provided financial assistance, and Stampfli occasionally saw him in the community, but she would

¹ All references to the verbatim report of proceedings are to the single volume of transcript dated May 2 and 3, 2016, and June 23, 2016. This volume includes both the jury trial and the sentencing hearing.

not always make contact with him. RP 75. Stampfli testified that on one occasion sometime in late January, 2016, she and another woman had gone to Wagner's Bakery for lunch on a Sunday. Wright had followed them, pressing his face and hands to the glass and making eye contact with the women from outside the bakery. He eventually came inside, purchased a meal, and sat beside them. This made them uncomfortable and, since the conversation was confidential, Stampfli and her companion left immediately. RP 75-76.

Stampfli testified at trial that Wright often made odd remarks to which she did not know how to respond. They had never had an intimate relationship or any conversations of a sexual nature. RP 77-78. He typically dressed nicely in a button-down shirt, jacket, tie, and hat. On February 7 when she opened the door to him he was wearing low-slung jeans, a leopard skin vest, no shoes, and no shirt. Wright told her he was cold and needed coffee. Stampfli had many tasks to accomplish before the services and told him she would make coffee for him, but she was busy and could not sit and visit. RP 79.

Wright accompanied Stampfli to the room where the coffee supplies were kept. Stampfli began preparing the coffee while

Wright stood on the opposite side of a counter. RP 80-81. Stampfli testified that Wright made a remark to the effect that he was there to eat her pussy. Stampfli “freaked out” and told Wright it was not okay to speak to her like that. RP 81. Stampfli was flustered and anxious and did not at the time of trial recall Wright’s specific movements, statements, or his demeanor. RP 81-83. As she was finishing preparing the coffee, still facing the counter, Wright came up behind her, his front to her back, and pushed into her so that his knee went between her legs and his arms reached around her and his hands grabbed her crotch. RP 82-83. Stampfli, who is shorter than Wright, testified that this grabbing occurred soon after the comment about eating pussy. RP 83. As he grabbed her, Wright pulled Stampfli toward him briefly. Stampfli again “freaked out,” screaming at Wright to get away from her, flailing and pushing at him. RP 87-88. Wright’s only comment was that he didn’t do anything. RP 87.

Stampfli was eventually able to get Wright out the front door and she immediately locked all the doors. She was frightened and upset, but also recognized the need to pull herself together so that she could lead the two upcoming worship services. RP 88-90. On the advice of a colleague whom she texted, Stampfli called the

police. RP 91. The police took an initial report but came back after the second service ended to finish taking information from her. RP 91-92. After the second service Stampfli saw Wright near the coffee table but did not approach him, and two men from the church escorted him out of the building. RP 92-03.

On cross-examination, defense counsel conducted this exchange with Stampfli:

[Counsel]: Ms. Stampfli, I have one brief question and I know it may sound crazy but it's part of the law and I just want to know, did you on that Sunday have any sexual contact with Mr. Wright?

[Stampfli]: If him grabbing me from behind equates to sexual contact, I'd have to say yes.

[Counsel]: I'm talking about you. Did you have any sexual contact with him?

[Stampfli]: Meaning did I seek out sexual contact?

[Counsel]: Did you have any sexual contact? A yes or no question, ma'am.

[Stampfli]: No.

RP 95.

Olympia officers Henrichs and Nutter responded to Stampfli's call to the police. RP 50-51. Wright was no longer at the scene and Henrichs broadcast a description so other officers could watch for him. RP 53. Nutter located Wright about noon at a

location seven or eight blocks from the church. RP 55, 66. He was wearing the clothing described by Stampfli and had a pair of underwear in his right vest pocket. RP 55, 57-58, 67-68. Wright was placed under arrest and taken to the Thurston County Jail. RP 59, 69.

2. Procedure.

Wright was charged by information with one count of indecent liberties by forcible compulsion on February 10, 2016. CP 7. The record does not appear to reflect the arraignment date or the trial date set at arraignment. However, Wright asserts that it was properly set. Appellant's Opening Brief at 8. The omnibus order entered on March 16, 2016, reflected a trial date of April 11. CP 8. On April 6, the parties advised the court that they were ready and the case was confirmed for trial on April 11, 2016. That order reflected the last date for trial as April 23, 2016. Supp. CP ____ .

On April 11, another case took precedence and went to trial instead, and the parties made a joint motion to continue the trial date to the week of April 25, 2016. CP 54-55. On April 12, the State moved to continue the trial date because Officer Henrich was on vacation the week of April 25 through 30. CP 56. The court entered an order, over Wright's objection, resetting the trial for May

2, 2016. The order states that the last allowable date for trial, pursuant to CrR 3.3, was June 2, 2016. CP 57-58. On April 27, 2016, the court entered an order confirming the trial for May 2, 2016, and noting the last date for trial was May 23, 2016. CP 59-60. Wright has not provided the transcript of any of these hearings, and thus any record that may have been made outside of the written documents is not before this court.

No pretrial motions were made or heard. CP 10-11. Trial began on May 2, 2016, and concluded on May 3. CP 18-22. Sentencing was held on June 23, 2016. CP 33. Wright was sentenced to 60 months to life. CP 44.

C. ARGUMENT.

1. The trial court did not violate CrR 3.3 by holding the trial on May 2, 2016.

A defendant being detained in jail must be brought to trial within 60 days of the “commencement date,” which is usually the date of arraignment. CrR 3.3(b)(1). Periods of time excluded from this 60-day limit include continuances granted by the court pursuant to CrR 3.3(f). CrR 3.3(e)(3). CrR 3.3(f)(2) provides:

Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will

not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion on or on behalf of any party waives that party's objection to the requested delay.

If a period is excluded, then "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). Thus, each excluded period brings with it a 30-day extension of the speedy trial deadline. When Wright joined the motion to continue from April 11 to April 25, CP 55, he waived any objection to the delay. CrR 3.3(f)(2). A 30-day period of time was added by CrR 3.3(b)(5), making the last allowable date for trial May 25, 2016. When the court granted the State's motion for a one-week continuance on April 13, CP 57, setting a new trial date of May 2, the 30-day extension provided by CrR 3.3(b)(5) made the last allowable date for trial June 2, 2016.

Since trial began on May 2, it was well within the speedy trial time prescribed by CrR 3.3.

A trial court may continue a trial even over the objection of the defendant. A reviewing court will not disturb an order granting a continuance "absent a showing of a manifest abuse of discretion." State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). "A

manifest abuse of discretion occurs when a court's decision is based on untenable grounds or is made for untenable reasons." State v. Angulo, 69 Wn. App. 337, 341-42, 848 P.2d 1276, *review denied*, 122 Wn.2d 1008 (1993). Whether a court correctly applied CrR 3.3 is a question of law reviewed de novo. State v. Lackey, 153 Wn. App. 791, 798, 223 p.3d 1215 (2009). Ruling on a motion to continue is discretionary with a judge because it involves "such disparate elements as surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures." State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

The State sought a one-week continuance because the arresting officer was scheduled to be on vacation the week of April 25. CP 56. The scheduled vacation of an investigating officer constitutes good cause to continue a trial date, even beyond the 60-day limit for an incarcerated defendant. State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005, 60 P.3d 1212 (2003); State v. Jones, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003), *review denied*, 151 Wn.2d 1006, 87 P.3d 1184 (2004); State v. Selam, 97 Wn. App. 140, 143, 982 P.2d 679 (1999).

Wright argues that when the State discovered the investigating officer was on vacation the week of April 25 it could have set the trial for the week before that. Appellant's Opening Brief at 9. But there could be any number of reasons why that was not possible, reasons which would not necessarily be reflected in the written orders. Wright did not provide the transcript of any of the pretrial motions. It is the appellant's burden to provide a complete record. State v. Nguyen, 68 Wn. App. 906, 915, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993).

CrR 3.3 is not constitutionally based. State v. Hall, 55 Wn. App. 834, 841, 780 P.2d 1337 (1989). Continuances granted within the speedy trial time are not violations of the rule; dismissal is required only when the speedy trial period has expired. Unless that is the case, the defendant must demonstrate "actual prejudice" before his case will be dismissed. Id. Wright has not alleged that he was prejudiced by a three-week delay from the original trial date, nor is any prejudice apparent from the record. He does not claim that any witnesses became unavailable or that memories faded during those three weeks.

Here the trial court did follow CrR 3.3 in setting the trial dates. Wright has simply omitted a key provision of that rule in making his claim of error.

2. The State presented sufficient evidence to support the conviction for indecent liberties with forcible compulsion.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. 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.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting

testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Wright argues that the evidence was insufficient to support a conviction for indecent liberties for two reasons. First, he claims that the touching was not forcible, in that he did not overcome the victim's resistance. Second, he argues that he did not cause the victim to have contact with him. Appellant's Opening Brief at 10-12.

Indecent liberties is criminalized by RCW 9A.44.100, which provides, in pertinent part:

- (1) A person is guilty of indecent liberties when he or she knowingly causes another person to have sexual contact with him or her or another
 - (a) By forcible compulsion.

Sexual contact is defined in RCW 9A.44.010(2):

- (2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

Forcible compulsion is defined in RCW 9A.44.010(6):

- (6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

a. There was forcible compulsion.

The victim testified that Wright came up behind her, pushed himself into her, forced his leg between hers, pulled her toward him, reached around her body and grabbed her crotch. RP 82-87. She flailed at him, pushed him, and screamed at him to get away. RP 87-89. Wright cites to State v. Ritola, 63 Wn. App. 252, 817 P.2d 1390 (1991), arguing that the facts in his case are similar to those in Ritola. In Ritola, the defendant, a juvenile resident at a boys ranch, stood behind a female counselor and grabbed her breast, squeezed it, and “‘instantaneously’ removed his hand.” Id. at 253. He was convicted of indecent liberties by forcible compulsion. The Court of Appeals reversed, finding that “[f]orcible compulsion required more than the force normally used to achieve sexual intercourse or sexual contact.” Id. at 254. Ritola had used no more force than was part of any touching, and the force was not used to overcome resistance. Id. at 254-55.

The facts in Wright’s case are significantly different. He did not let go until the victim flailed her arms and pushed him away. He did not grab her and “‘instantaneously” let go. For at least a short span of time, he was holding her in a place she did not want to be held, and doing so by force that overcame her resistance.

b. Wright caused the victim to have sexual contact.

Wright's second argument is that he did not cause the victim to do anything. He concedes he had sexual contact with her, but apparently argues that she did not have sexual contact with him. He made a similar argument at trial. RP 117-18. Although Wright does not flesh out this argument, the inference is that he would have caused the victim to have sexual contact with him only if, for example, he manipulated her hand to touch an intimate part of his body. When defense counsel cross examined Stampfli, he was able to get her to say that she did not have sexual contact with Wright. RP 95. It is clear, however, that she did not understand what he was getting at, and thought he was asking if Stampfli had asked for or encouraged Wright's touching her. RP 95. That is not a basis for this court to find that Wright did not cause Stampfli to have sexual contact with him or anyone else.

Not surprisingly, the State has been unable to find any cases that address that specific argument. It is, however, only common sense that by touching the victim's genitals, he was causing her to have sexual contact with him. Sexual contact may occur through clothing. State v. Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008). A conviction for indecent liberties was affirmed in State v.

Brooks, 45 Wn. App. 824, 727 P.2d 988 (1986). In that case the defendant had masturbated over a two-month-old child, leaving semen on the rubber pants covering her diaper, her shirt, her booties, and her face. Id. at 825-26. The court found that to be “sufficient contact with the intimate parts of the infant for gratifying Mr. Brooks’ sexual desire.” Id. at 827. By no stretch of the imagination did Brooks “cause” the infant to have contact in the sense that Wright asserts.

The evidence was sufficient to prove that Wright caused Stampfli to have sexual contact with him.

3. Defense counsel was not ineffective for failing to raise a speedy trial objection or for failing to bring a Knapstad motion.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of 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 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687; Hendrickson, 129 Wn.2d at 77-78; McFarland, 127 Wn.2d at 334-35.

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged

error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

a. Speedy trial objection.

As argued above, there was no speedy trial violation and therefore no ineffective assistance of counsel for that reason.

b. Failure to bring a Knapstad motion.

During closing argument, defense counsel did not dispute any of the facts presented. RP 116. He argued, as Wright does on appeal, that Wright did not cause the victim to do anything, and therefore the State had not proved all of the elements of indecent liberties. RP 117-18. Wright now asserts that this was a Knapstad argument.

In Washington, it is well settled that a criminal case may be dismissed prior to trial upon the filing of a motion pursuant to State v. Knapstad, 107 Wn. 2d 346, 729 P.2d 48(1986). In Knapstad, the Washington State Supreme Court set forth a procedure that enables a defendant to challenge the State’s evidence prior to trial, the remedy being dismissal of the charges without prejudice. Briefly, the procedure requires that the defendant file an affidavit setting forth the undisputed facts. The State in turn files a responsive affidavit, which denies or in some way creates a dispute

as to a material fact. If there is indeed a dispute as to a material fact, then pursuant to Knapstad, the motion to dismiss must be denied. Knapstad at 356. If however, all parties agree that there is no dispute as to the facts, the court determines whether the facts as relied upon by the State, as a matter of law, establish a prima facie case of guilt. Knapstad at 357. If the court finds that there is not a prima facie case, it has the discretion to hold the defendant for a period of time, or require bail for release, allowing the State to file a new charging document. Id.

In Wright's case, there is nothing in the record to support the conclusion that there was no factual dispute before trial. The victim testified that Wright denied doing anything. RP 87. Officer Henrichs testified that when Wright was arrested he said he did not touch the victim, and suggested that she had touched him. RP 55-56. Wright did not testify, but that decision may not have been made until after the State rested its case.

In addition, as argued in section 2 above, the facts, even if undisputed, did constitute a crime. Had defense counsel brought a Knapstad motion, the trial court would certainly have denied it. The State presented a prima facie case of guilt, and it was for the jury to

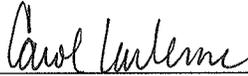
decide if the State had proved it beyond a reasonable doubt. Only the jury makes the latter decision.

There was no ineffective assistance of counsel.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Wright's conviction for indecent liberties.

Respectfully submitted this 7th day of February, 2017.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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TO: DEREK M. BYRNE, CLERK
COURT OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA WA 98402-6045

VIA E-MAIL

TO: JOEL MORRIS PENOYER
ATTORNEY AT LAW
P O BOX 425
SOUTH BEND WA 98586-0425

PENoyARLAWYER@GMAIL.COM

EDWARD HARRY PENOYAR
ATTORNEY AT LAW
P O BOX 425
SOUTH BEND WA 98586-0425

EDWARDPENoyAR@GMAIL.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of February, 2017, at Olympia,

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CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

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