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No. 52236-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ADAM JOSEPH PERSELL,

Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 16-1-01580-34

BRIEF IN RESPONSE TO STATEMENT OF
ADDITIONAL GROUNDS

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sentencing as a persistent offender based on the existence of a prior sex strike offense violates constitutional principles of double jeopardy.

2. Whether WPIC 100.05 adequately informs the jury as to the standards for determining whether a defendant took a substantial step toward the commission of an offense.

3. Whether this Court should consider Persell's claim of error regarding an entrapment defense when the record does not support that the defense requested an entrapment instruction.

4. Whether the trial court abused its discretion when it denied Persell's Motion to Dismiss based on alleged outrageous government conduct.

5. Whether Persell's claims of ineffective assistance of counsel overcome the strong presumption of efficient counsel when the record does not demonstrate deficient performance or prejudice to Persell.

B. STATEMENT OF THE CASE.

For purposes of this response, the State will rely on the relevant facts contained in the State's Brief of Respondent, filed on

March 6, 2019, with additions as included in the argument sections below.

C. ARGUMENT

1. PERSELL'S SENTENCE UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT IS CONSTITUTIONAL.

The Washington Constitution provides that “[n]o person shall be ... twice put in jeopardy for the same offense.” CONST. art. I, § 9. U.S. CONST. amend. V “provides the same scope of protection” as the state constitution. State v. Sutherby, 165 Wn.2d 870, 878, 204 P.3d 916 (2009). The standard of review for double jeopardy claims is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Persell claims that his conviction and sentencing to life without the possibility of parole under the Persistent Offender Act places him in jeopardy twice for the same offense.

In determining whether a defendant is subject to sentencing as a persistent offender, the trial court must decide by a preponderance of the evidence whether a defendant has a criminal history and specify the convictions it has found to exist. State v. Knippling (2007) 141 Wn. App. 50, 168 P.3d 426, *review granted* 163 Wn.2d 1039, 187 P.3d 271, affirmed 166 Wn.2d 93, 206 P.3d 332. That standard was met in the present case. The trial court

found that Persell was subject to persistent offender sentencing based on Persell's prior conviction for rape of a child in the second degree and the three convictions in the present case.

"The Persistent Offender Act in Washington state dictates that in certain circumstances the sentence is required to be life in prison . . . I'm going to find that Mr. Persell is a persistent offender as I believe is required by the record in this case. Specifically, there is a prior conviction for rape of a child in the second degree out of Mason County, and we have the convictions in this case. So the sentence is going to be life in prison as a persistent offender."

2 RP 9.1 Therefore, Persell's conviction properly fell within the scope of the Persistent Offender Act.

This Court has rejected claims that punishment for habitual offenders violates both the United States and the Washington State Constitutions. State v. Williams, 9 Wn. App. 622, 625-625, 513 P.2d 854, 856-57 (1973). "The habitual criminal statute enhances the punishment of those found guilty of a crime who are shown to have been convicted of other crimes in the past." Id. See also, Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948). "The question of previous convictions is important only to determine whether the defendant has shown a persistence in crime which

¹ Consistent with the State's original Brief of Respondent, the jury trial held July 24-26, 2018, will be referred to as RP, the sentencing hearing held August 1, 2018, will be referred to as 2 RP. Additionally, the motion hearing held on March 26, 2018, will be referred to in this brief as 3 RP.

authorizes the severer penalty.” Williams at 857. By increasing the punishment for the last offense, the statute does not inflict a double punishment for the same offense, nor place the offender twice in jeopardy. Id. The rationale of Williams applies equally to the current persistent offender statute, RCW 9.94A.570.

The Supreme Court of the United States has rejected double jeopardy challenges because an enhanced punishment imposed for the later offense “is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,” but instead as “a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.” Witte v. United States, 515 U.S. 389, 400, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) (citing Gryger v. Burke, 334 U.S. at 732). See also Spencer v. Texas, 385 U.S. 554, 560, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); Oyler v. Boles, 368 U.S. 448, 451, 82 S.Ct. 501, 7 L.Ed 446 (1962); Moore v. Missouri, 159 U.S. 673, 677, 16 S.Ct. 179, 40 L.Ed. 301 (1895) (under a recidivist statute, “the accused is not again punished for the first offense” because “the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself”).

Despite his claims, Persell was not punished a second time for his March 18, 2001, Mason County conviction of rape of a child in the second degree. Persell was sentenced in accordance with his convictions of two counts of attempted rape of a child in the first degree and one count of attempted rape of a child in the second degree. His previous conviction made it mandatory to impose a sentence of "total confinement for life without the possibility of release" under the Persistent Offender Act. RCW 9.94A.570.

2. THE JURY INSTRUCTION GIVEN BY THE TRIAL COURT FOR 'SUBSTANTIAL STEP' IS NOT UNCONSTITUTIONALLY VAGUE.

RCW 9A.28.020 defines criminal attempt. Pursuant to that statute, a person is guilty of an attempt to commit a crime if the person, with the intent to commit a specific crime, does any act that is a substantial step toward commission of the crime. RCW 9A.28.020(1). In order to constitute a "substantial step," the conduct must strongly corroborate the actor's criminal purpose. State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002); State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995). In the general context of attempt cases, a substantial step requires more than mere preparation, State v. Townsend, 147 Wn.2d at 679, and more than a mere request for another to commit a crime, State v. Billups,

62 Wn. App. 122, 813 P.2d 149 (1991). “The term ‘substantial step’ is not a technical one so as to require definition but rather clearly advises the public that mere preparation to commit a crime is not a criminal offense.” State v. Cozza, 19 Wn. App. 623, 626, 576 P.2d 1336, 1339 (1978) *e. g.*, State v. Goddard, 74 Wn.2d 848, 447 P.2d 180 (1968). State v. Denney, 69 Wn.2d 436, 418 P.2d 468 (1966). Cf., Model Penal Code, s 5.01(2).

The Supreme Court of Washington found that an instruction for attempt was “given correctly [when the trial court] stated that a person is guilty of attempt if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of the crime.” State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382, 386 (1978). See State v. Hardwick, 74 Wn.2d 828, 447 P.2d 80 (1968). The instruction was properly given because it “qualified the meaning of a ‘substantial step’ by stating that the conduct must be more than mere preparation. It was proper to use language from the statute in the instruction.” Workman, 90 Wn.2d at 449. After an instruction is properly given, “[t]he question of what constitutes a ‘substantial step’ under the particular facts of the case is clearly for the trier of fact.” Id. The Workman Court found that “[t]he instruction given informed the jury that mere preparation would not be

sufficient, that something more must be present in order to constitute a substantial step. When preparation ends, and an attempt begins, we have held, always depends on the facts of the particular case.” Id. at 449-450. Therefore, the substantial step instruction given in Workman was not unconstitutionally vague. Id. at 450.

The trial court gave an identical instruction in the present case. The trial court judge instructed the jury as follows: “Instruction No. 12: A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.” RP 213; CP 351. The instruction given was the verbatim pattern jury instruction. 11 Wash.Prac. WPIC 100.05 (4th Ed., 2016). That instruction, combined with the to convict instructions, as a whole, adequately defined “substantial step” for the jury. State v. Eplett, 167 Wn. App. 660, 666, 274 P.3d 401 (2012); State v. Davis, 174 Wn. App. 623, 638, 300 P.3d 465 (2013), *review denied*, 178 Wn.2d 1012, 311 P.3d 26 (2013).

Therefore, as in Workman, the substantial step instruction given by the trial court was not unconstitutionally vague. The trial court's instructions, taken as a whole, regarding the definition of a substantial step toward the commission of Persell's two counts of

attempted rape of a child in the first degree and one count of attempted rape of a child in the second degree were properly given.

3. PERSELL DID NOT PUT FORTH AN ENTRAPMENT DEFENSE AT TRIAL.

“Under RAP 2.5(a), an appellate court may refuse to hear a claim not preserved by objection below. Thus, in general, a party may not raise an issue for the first time on appeal that it did not raise below.” State v. Mercado, 181 Wn. App. 624, 632, 326 P.3d 154, 158 (2014) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)). There is nothing presented in the record that would indicate that the Appellant or Appellant’s trial counsel attempted to put forth an entrapment defense or was prevented by the trial court from doing so. Persell’s proposed jury instructions did not request the court to instruct the jury with an instruction of an entrapment defense. RP 184, 191-197.

The only reference to an entrapment defense in the record was in the State’s motions in limine prior to trial, Supp. CP ___, and during the motion hearing on March 26, 2018. 3 RP 56-57. In response to the trial court’s questioning, counsel for defendant Bryan Glant indicated that the motion was not intended to be an

entrapment argument. 3 RP 57.² During the motion hearing, counsel for Persell did not argue for an entrapment instruction. 3 RP 32-37. The decision not to ask for an entrapment instruction was strategic, as will be argued below.

4. THE TRIAL COURT CORRECTLY REJECTED PERSELL'S MOTION TO DISMISS ALLEGING OUTRAGEOUS GOVERNMENT CONDUCT.

“Outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” State v. Lively 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). For police conduct to violate due process, “the conduct must be so shocking that it violates fundamental fairness.” Id. Examples of outrageous conduct include “those cases where the government conduct is so integrally involved in the offense that the government agents direct the crime from the beginning to end, or where the crime is fabricated by the police to obtain a defendant’s conviction, rather than to protect the public from criminal behavior.” Id. at 21.

² The motion hearing held on March 26, 2018, involved several defendants who each added onto defendant Bryan Glant’s original motion to dismiss. See CP 24-180.

“Public policy allows for some deceitful conduct and a violation of criminal laws by the police in order to detect and eliminate criminal activity.” Id. at 20. “Dismissal based on outrageous conduct is reserved for only the most egregious circumstances.” Id. In reviewing a claim of outrageous government conduct, the court evaluates the totality of the circumstances. Id. at 21. Factors that a court must consider when determining whether police conduct offends due process are

“whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, whether the government controls the criminal activity or simply allows for the criminal activity to occur, whether the police motive was to prevent crime or protect the public, and whether the government conduct itself amounted to criminal activity or conduct repugnant to a sense of justice.”

Id. at 22. A trial court’s order on a motion to dismiss on the basis of outrageous governmental misconduct is reviewed “under an abuse of discretion standard.” State v. Athan, 160 Wn.2d 354, 375, 158 P.3d 27 (2007). “Abuse of discretion requires the trial court’s decision to be manifestly unreasonable or based on untenable grounds or untenable reasons.” Id. at 375-76 “A trial court abuses

its discretion when its decision adopts a view that no reasonable person would take.” State v. Solomon, 3 Wn. App.2d 895, 910, 419 P.3d 436, 444 (2018) (citing State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012)).

Here, the trial court meticulously considered the Lively factors in concluding that Purcell had failed to demonstrate outrageous government conduct. 3 RP 61-68. It is clear from the record that the trial court’s conclusion that “the overall police motive was to prevent crime and to protect the public,” was correct. 3 RP 67; CP 206.

Additionally, it is clear that Washington State law authorizes the State Patrol to solicit funds to support the MECTF. RCW 13.61.110. That statute is the governing statute for the MECTF. Section (4) provides that the chief of the state patrol *shall* seek public and private grants and gifts to support the work of the task force. (Emphasis added). Contrary to Persell’s argument, there is no provision in the law that prohibits the chief of the state patrol from delegating this authority. In fact, Chapter 7 of the MECTF “IAD standard procedures manual specifically delegates such a duty to detective supervisors stating that the duties of a Task Force

Detective Supervisor includes, "initiating budget and grant requests." CP 233.

As argued by the State during the hearing on this issue, to require the chief of the state patrol to handle every task specifically assigned to him by statute without delegation would be absurd. The example that State provided is RCW 43.43.035, which following Persell's logic would require the chief of the state patrol to personally provide security for the governor. 3 RP 53. Neither Detective Sgt. Rodriguez nor the MECTF violated the law by soliciting private donations for funding. Even if there were minor defects in compliance with funding statutes, the trial court correctly notes that no Washington case has applied the doctrine of outrageous conduct to a funding issue.

Finally, the record made it clear that the government merely infiltrated the already existing world of child sexual exploitation by putting an ad on Craigslist. It was Persell who responded, and Persell who informed the undercover officer what he wished to do with her children. RP 136. The trial court properly applied the Lively factors and did not abuse its discretion by denying Persell's motion to dismiss.

5. PERSELL RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

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.

Persell has not overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. at 687.

Persell bases his ineffective assistance of counsel claim on his “shock and horror” when trial counsel rested their case at the start of proceedings on July 26, 2018. Appellant’s Statement of Additional Grounds for Review, Page 5. What Persell fails to include in his briefing was the conversation between the trial judge and Persell’s attorney which took place on the record on July 25, 2018, regarding how trial counsel, and ultimately Mr. Persell, wanted to proceed.

“(Jury not present.)

THE COURT: Mr. Jefferson, does the defense intend to call any witnesses?

MR. JEFFERSON: No. Your Honor, I do have an issue in regard to . . . Officer McDonald. We played part of an exhibit, and there was some sound or noise on that exhibit, and I want some - - I want an opportunity to listen to the exhibit, but I’m not certain how I’m going to proceed, how I’m going to put up a

witness in regards to that exhibit at this time, so I kind of need some time to figure it out.”

RP 183. The Court then asked Mr. Jefferson if Mr. Persell would be testifying in order to properly introduce that that piece of evidence included in the record. RP 184. Mr. Jefferson requested that the court grant him time to consult with Mr. Persell as to how he wished to proceed. RP 184. The court granted the request. RP 184.

“(Jury not present.)

THE COURT: I am going to be generous here if you feel like you need some time.

MR. JEFFERSON: Your Honor, what I am going to essentially propose is that we get started tomorrow. What I believe will happen tomorrow is that we will be doing - - that we will be doing closing, but I need to have a conversation with Mr. Persell just in an abundance of caution. So that sort of give the Court- we had some conversations. I think we know where we’re going, but I wanted to check in. And then I wanted to try to figure out my issue with that exhibit and see how I might proceed.

RP 184. The proceedings were purposely kept short so that Mr. Jefferson had ample time to consult with Persell and “change his mind overnight [or decide] that he wants to put witnesses on.” RP 186.

Persell was present for yet another time that Mr. Jefferson announced the strategic decision not to call witnesses on the morning of July 26, 2018 before the jury was present.

“(Jury not present.)

THE COURT: Mr. Jefferson, I just wanted to check with you to see how you would like me to proceed for the remainder of the trial. I have had defense counsel prefer in these circumstances to have different things done. What would you like to mechanically happen when the jury gets back in?

MR. JEFFERSON: Your Honor, I believe that the State had rested.

THE COURT: They have.

MR. JEFFERSON: And so at this time the Court could ask me if I want to call any witnesses, and I can say no, and at that point I would say the defense rests.”

RP 199. It is abundantly clear from the record that Mr. Persell was aware of Mr. Jefferson’s decision to rest and his use of caution and the strategy in doing so. A legitimate trial strategy cannot serve as the basis of a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Persell’s argument that his attorney failed to file a motion regarding law enforcement accessing his cell phone without a warrant is unsupported by the record. Exhibit 9. Matters outside of

the record are generally not considered in a direct appeal. State v. McFarland, 127 Wn.2d at 335. Even if Persell's claims were correct, a suppression motion would only have the potential of excluding the alleged "test" messages that occurred after Persell's arrest, which do not appear to have been offered during the trial. The text messages relied upon by the State were the conversations that Persell had with law enforcement, which would not be suppressed even if Persell's attorney had pursued the issue that Persell raises. Persell demonstrates neither deficient performance nor prejudice.

Likewise, Persell cannot demonstrate that his attorney's decision not to present evidence regarding his work schedule was not strategic. When the record does not reveal whether counsel had legitimate reasons for strategic decisions, a claim of deficient performance is unsupported. State v. Linville, 191 Wn.2d 513, 526, 423 P.3d 842 (2018). The record clearly demonstrates that Persell's counsel discussed whether the defense would be offering evidence with Persell. On the record, Persell can neither demonstrate deficient performance or prejudice from his trial counsel's actions or decisions not to offer evidence.

Similarly, the decision whether or not to call an expert witness regarding sexual deviancy is a matter of legitimate trial strategy when the decision is informed. State v. Jones, 183 Wn.2d 327, 341, 352 P.3d 776 (2015). While obtaining a pre-trial psychosexual evaluation to aid in negotiations is a common defense strategy, using that evaluation at trial is less common. Had defense counsel called an expert witness for the purpose of testifying that Persell was not sexually deviant, he would have opened the door for the State to discuss Persell's prior offenses. Not calling such a witness is clearly strategic.

Moreover, the decision to not pursue an entrapment defense was also strategic. It was clear throughout the record that the defense strategy was to demonstrate that Persell did not take a substantial step toward completing the actions that he had discussed with law enforcement. To prove the defense of entrapment, a defendant must show that (1) he committed a criminal act, (2) the State lured or induced him into committing the act, and (3) he lacked a predisposition to commit the act. State v. Lively, 130 Wn.2d at 9. A defendant cannot be entrapped into committing a crime in which he denies participation. State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994), *review denied*,

126 Wn.2d 1008, 892 P.2d 1088 (1995). Persell's trial counsel strategically argued that Persell had not taken a substantial step, and there was not evidence to show that he intended to, going as far as comparing the case to the Tom Cruise movie, "Minority Report." RP 233. Where Persell was not admitting that he committed a criminal act, it was not unreasonable for his trial counsel not to request an entrapment instruction. Moreover, an argument regarding "predisposition" may have opened the door to evidence regarding Persell's prior sex offense conviction. His counsel acted strategically.

Persell fails to demonstrate either deficient performance or prejudice, therefore, his claims of ineffective assistance of counsel must fail.

D. CONCLUSION.

This response is intended to supplement the Brief of Respondent and address issues that were raised in the Statement of Additional Grounds (SAG) which were not addressed in the original briefing. To the extent issues raised in the SAG were discussed in the original briefing, those issues have purposely been excluded here. The Persistent Offender Accountability Act does not violate double jeopardy and the jury was correctly informed

regarding the meaning of a substantial step. The trial court acted well within its discretion when it denied the pretrial motion to dismiss for alleged outrageous government conduct. Further, Persell fails to demonstrate that his trial counsel was deficient or that counsel's performance prejudiced him in any way. For these reasons, the additional grounds raised are without merit, and the State respectfully requests that this Court affirm Persell's convictions and sentence.

Respectfully submitted this 10th day of July, 2019.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: July 10, 2019
Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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