

FILED
Court of Appeals
Division II
State of Washington
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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TYLER J. McVEY

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF THURSTON COUNTY

Cause No. 15-1-00783-5

REPLY BRIEF OF APPELLANT

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WSB #17283

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I. STATEMENT OF THE CASE

Appellant adopts the statement of the case within appellant's opening brief.

II. ARGUMENT

A. Trial Counsel's failure to contact Mr. Schmidt and call him as a witness at trial constitutes deficient performance.

Trial counsel's failure to interview and call Mr. Schmidt at trial constitutes deficient performance. Respectfully, no evidence was presented by the respondent to establish which steps Mr. Brungardt took to determine or quantify any physical limitations that Mark Schmidt had that would have prevented him from being a competent witness. Although the trial judge, in his findings, stated that Mr. Schmidt's testimony would have been unbelievable, such conclusion is simply not supported by the evidence because trial counsel never interviewed Mr. Schmidt before trial to determine the entirety of his observations on the date of the alleged event.

As was known to Mr. Brungardt at the time of trial, Tyler McVey repeatedly told him about the importance of Mr. Schmidt being a witness. Yet, for fully unexplained reasons, Mr. Brungardt did not take the appropriate action to locate Mr. Schmidt to learn, first hand, whether Mr. Schmidt would be a productive witness at trial. As testified to by expert Don Winskill, no follow-up occurred after Investigator Haller noted that Mr. Schmidt was present during the time the allegation arose. RP 223:8-21. The investigation conducted by Mr. Haller, which consisted of text messaging, is simply insufficient. As set forth by

the Supreme Court's decision in *State v. Jones*, 183 Wn.2d 327, 346, 352 P.2d 776 (2015), "failure to interview a particular witness certainly constitutes deficient performance."

Here, Mr. Schmidt, a material and necessary witness, was never interviewed before trial, and the contact that Investigator Haller had with the purported Mr. Schmidt, via text messaging, cannot be deemed a meaningful substitute for an interview. It is absolutely impossible to determine whether a potential witness is helpful without some meaningful contact with the individual. Text messaging does not satisfy such a requirement.

Additionally, respondent completely ignores the teachings of *In Re Personal Restraint of McAllister*, #49417-5-II, 06/25/2017 whereupon this Court granted McAllister's PRP when trial counsel was deficient for failing to use exculpatory evidence at trial. Here, no evidence supports a reasonable decision or trial tactic of not contacting Mr. Schmidt before trial, particularly since Mr. McVey was adamant that Mr. Schmidt was a witness to all that had occurred the date that E.S. made her complaint. *See generally*, RP 140:11-25; 142:11-14.

Much like in *McAllister*, Mr. McVey was adamant that Mark Schmidt needed to be interviewed because he had first hand knowledge of the events surrounding any contact between Mr. McVey and E.S. *See* RP 230:12-231:14; 149:5-18. As such, trial counsel was deficient by failing to timely contact Mr. Schmidt and call him as a trial witness and, trial counsel's deficient performance prejudiced Mr. McVey's right to a fair trial.

B. Trial Counsel acknowledged his failure to effectively cross-examine the complaining witness.

Although it is correct that cross examining a child witness in a child sex case must be done delicately, the failure to cross examine such witness cannot be deemed a trial tactic when the witness provided inconsistent statements to a variety of individuals.

Here, Mr. Brungardt acknowledged that he did not impeach E.S. with her inconsistent statements although he had the opportunity to do so. Further, there were significant inconsistencies in E.S.'s pretrial statements and trial testimony that should have been highlighted during cross examination.

Q: All right. Now, in the Exhibit 4, which was the forensic examination of [E.S.], she acknowledged - - [E.S.] - - I say "she." [E.S.] acknowledged that Grandpa Mark was in the home, although she says he was in his room. If you want to take a look at page two of -

A: I agree.

Q: During the examination of [E.S.], the direct examination of [E.S.] - - and referring you to page 126 of Exhibit - - I'm not sure what that one is. Two. Is that two?

The Court: It is.

Mr. Purtzer: Thank you.

Q: (By Mr. Purtzer) Are you at page 126?

A: Yes.

Q: All right. During the examination by Mr. Juris of [E.S.] on direct he asked [E.S.] if there was anybody else at the home at the time, and she said no, correct?

A: Correct.

Q: All right. So that was inconsistent with respect to what [E.S.] had said to Ms. Batson some year and a half earlier, correct?

A: Yes.

Q: All right. And it was also inconsistent with the information that you knew related to Mr. Schmidt being present based upon Investigator Haller's report to you on his conversation with Kecia Johnson.

A: Yes.

Q: In the cross examination that you conducted you – and in response to Mr. Jackson's questions here that being aggressive in a cross examination with a small child can be very, very - - can be a poor choice of tactics.

A: Yes.

Q: Correct?

A: Yes.

Q: But you can cross examine a child without being berating or judgmental or accusatory or harsh.

A: Correct.

Q: All right. At any point in time in your cross examination - - well, strike that. Did you impeach her with the testimony of what she'd said earlier?

A: Regarding the absence of Mark in the house? I did not.

Q: I'm sorry.

A: Regarding her absence – the absence in her testimony of Mark in the house I did not.

Q: Okay. But you did ask her wasn't there a man also in the home, and she said no. And taking a look at page 129 lines eleven through 13.

A: Correct.

Q: And you did not impeach her with her prior inconsistent statement –

A: I –

Q: - - her prior inconsistent statement to Ms. Batson.

A: I did not.

Q: With regard to Mark being present.

A: I did not.

Q: But she volunteered that the only person that was in her home in addition to Tyler was her baby-sitter, and that's at line 16-18 on page 129.

A: Correct.

Q: All right. She said her grandfather wasn't there, but her baby-sitter was present, correct?

A: Correct.

Q: But she didn't report that to any other individual at any other point in time.

A: She did not.

RP 145:20-148:7

Q: Okay. You were aware that [E.S.] did have a baby-sitter at some point in time.

A: I was.

Q: All right.

A: A woman.

Q: A woman. Correct. And you did not contact her or put her on the stand for purposes of impeaching the testimony of [E.S.] regarding her being present, but - - her, the baby-sitter, being present during this period of time.

A: I did not.

RP 148:20-149:4

Further, Mr. Brungardt acknowledged that when you have a case with an allegation of sexual abuse, but no physical evidence and your client doesn't testify, you must point out inconsistencies in a child's statement to show the child's lack of credibility.

Q: All right. And would you agree that in cases of this nature where there's an allegation and no physical evidence and your client doesn't testify that you need to respectively point out these inconsistencies to show the child's credibility or lack of credibility.

A: Correct.

RP 148:8-13.

Clearly, Mr. Brungardt did not do so and he acknowledged that he failed to point out E.S.'s inconsistent statements during his closing argument.

Q: All right. In your closing argument which is on page - - excuse me. Starting on page 295 to 304 you did not reference the inconsistencies of [E.S.]'s statements regarding who was present or ever relay that Mark Schmidt was present during the time in which this event occurred.

A: I did not.

RP 148:14-19

Respectfully, and again, this failure was deficient and this deficient performance affected Mr. McVey. Because the defense presented no evidence to rebut the child's testimony and failed to establish, through cross examination, the inconsistencies in the child's testimony, no evidence existed to rebut the child's

testimony of improper touching. Respectfully, such failure constitutes deficient performance and that deficient performance prejudiced Mr. McVey at trial.

III. CONCLUSION

Although deference is given to the trial court when it makes Findings of Fact and Conclusions of Law, in this case, trial counsel's performance was completely deficient and such deficiency prejudiced Mr. McVey's constitutional right to a fair trial. The only witness who testified about the alleged abuse was the complaining witness, E.S. The inconsistencies in her testimony were never addressed, and the only other witness, aside from Mr. McVey, who had knowledge of E.S.'s claims was Mark Schmidt, who was never meaningfully interviewed or called to testify at trial. Based upon trial counsel's failure to conduct a meaningful interview of Mr. Schmidt and call him as a witness at trial, and failure to meaningfully cross examine the complaining witness, Mr. McVey was denied his right to a fair trial because no evidence was introduced to rebut the child's statements.

Given this evidence, which deficiencies are supported by the testimony of expert witness, Don Winskill, Mr. Brungardt did not engage in a trial tactic when he failed to interview Mr. Schmidt or call him as a witness at trial, and it was not a trial tactic when he failed to cross examine the complaining witness about her inconsistent statements. Such failures constitute deficient performance, which prejudiced Mr. McVey's right to a fair trial.

Although counsel is aware that a defendant is not entitled to a perfect trial, he is entitled to a competently tried one. Mr. McVey did not receive a

competently tried trial. As such, and, respectfully, Mr. McVey urges this Court to reverse the trial court and to grant him a new trial.

DATED this 20th day of December, 2019.

HESTER LAW GROUP, INC. P.S.
Attorneys for Appellant

By: 

BRETT A. PURTZER
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this motion for extension of time to file appellant's statement of additional grounds to be served on the following in the manner indicated below:

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- ABC-Legal Messengers
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- U.S. Mail
- Hand Delivery
- ABC-Legal Messengers
- Email

Signed at Tacoma, Washington this 20th day of December, 2019.


LEE ANN MATHEWS

HESTER LAW GROUP, INC., P.S.

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