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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.

LEROY F. SALSBERY

Petitioner.

APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY
Cause No. 13-1-01430-1

REPLY BRIEF OF PETITIONER

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I. **STATEMENT OF THE CASE**

Petitioner relies on the statement of facts set forth in his opening brief.

II. **ARGUMENT**

A. *Mr. Salsbery's Decision to Testify was Coerced by Trial Counsel.*

As set forth in Petitioner's opening brief, Mr. Salsbery's decision not to testify was based on the comments and actions of his trial counsel, rather than based upon a voluntary decision. The State argues that Mr. Salsbery's and Sharon Babcock's declarations do not create a basis for a reference hearing because the declarations only rise to "speculation or conjecture". Respectfully, Sharon Babcock's declaration corroborates Mr. Salsbery's declaration about why Mr. Salsbery didn't testify. Respectfully, no logical reason from a factual or legal standpoint supports a reason for Mr. Salsbery not to testify. Further, Sharon Babcock's declaration is not self-serving. Rather, it is consistent and corroborates Mr. Salsbery's declaration, and is sufficient to warrant a reference hearing.

"A defendant who remains silent at trial may be entitled to an evidentiary hearing if he alleges that his attorney actually prevented him from testifying." *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 580 (1999). "On the Federal level, the defendant's right to testify is implicitly grounded in the Fifth, Sixth and Fourteenth Amendments. ... in Washington a criminal defendant's right to testify is explicitly protected under our State's Constitution. This right is fundamental and cannot be abrogated by defense counsel or by the court." *Id.* Only the defendant has the authority to decide whether or not to testify. *State v. Thomas*,

128 Wn.2d 553, 558, 910 P.2d 475 (1996). “The waiver of the right to testify must be made knowingly, voluntarily and intelligently. ... *Id.* at *Id.*”

The *Robinson* court cited to *In Re Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), wherein the defendant, Lord, claimed that the only reason he did not testify was because his attorneys thought that him testifying would be the “wrong thing” to do. *Id.* In determining that Lord had not made a sufficient showing to warrant an evidentiary hearing, the Court stated as follows:

This Court held that Lord’s mere assertion that his counsel advised him against taking the stand was insufficient to warrant an evidentiary hearing on the issue of whether the waiver was knowing and voluntary. We suggested, however, that Lorde would have been entitled to an evidentiary hearing had he alleged that his attorney ‘actually prevented’ him from testifying.

Robinson, 138 Wn.2d at 759.

Here, as set forth above, Mr. Salsbery has set forth factual evidence in order to merit an evidentiary hearing as, based on his declaration and Sharon Babock’s declaration, Mr. Salsbery’s counsel “actually prevented” him from testifying. That is the showing *Robinson* and *Lord* require. Accordingly, Mr. Salsbery has met that burden. Voluntariness is not established if a defendant’s will is overcome by the coercive acts of his counsel.

The State’s also suggests that evidence of Salsbery’s guilt was overwhelming because it included the testimony of the victim, and “six other witnesses relating the victim’s statements about the sexual abuse, the victim’s behavioral changes, and a chronology of events that placed the victim with Salsbery contemporaneous with the abuse.” Responsive Brief at 12-13. Significantly, however, the “victim’s testimony” was not consistent with the six

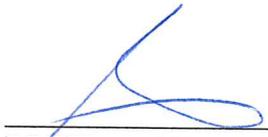
other witnesses who related G.M.'s testimony. In essence, there was one statement, G.M.'s, which was repeated by the other persons who testified about what they heard. Unfortunately, because Mr. Salsbery never testified, there was no evidence to expressly rebut G.M.'s testimony. Although Mr. Salsbery would not dispute that he was in G.M.'s presence, he would have significantly disputed that he had any inappropriate contact with her. Given that there was no other evidence offered by the defense to contradict G.M.'s testimony, Mr. Salsbery's counsel's decision to coerce Mr. Salsbery into not testifying caused actual and substantial prejudice and created a complete miscarriage of justice. Accordingly, Mr. Salsbery respectfully urges this Court to grant him an evidentiary hearing as his constitutional right to testify in his defense was violated.

III. CONCLUSION

Based upon the arguments of counsel in his opening and reply brief, Mr. Salsbery respectfully urges this Court to grant him an evidentiary hearing in this matter.

DATED this 6th day of April, 2020.

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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 reply brief to be served on the following in the manner indicated below:

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