

FILED

APR 02 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COA No. 30253-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JACK GLYN JONES, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENTS OF ERROR

A. The court erred by giving Instruction 10, the to-convict instruction for first degree child rape of MJ, without specifying the act relied on by the State for the charge.

B. Jack Glyn Jones received ineffective assistance of counsel, who failed to secure an expert witness in support of the defense that multiple interviews of JJ and MJ created false memories of the alleged abuse.

Issues Pertaining to Assignments of Error

1. Did the court err by giving Instruction 10, the to-convict instruction for first degree child rape of MJ, without specifying the act relied on by the State to form the basis for the charge, thus allowing conviction on less than a unanimous verdict? (Assignment of Error A). Instruction 10 stated:

To convict the defendant of the crime of rape of a child in the first degree as charged in count three, each of the following elements of the crime must be proved beyond a reasonable doubt:

One, that on or between April 16, 1997, to April 15, 2004, the defendant had sexual intercourse with MJ, dob 4/16/92;

Two, that MJ, dob 4/16/92, was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

Three, that MJ, dob 4/16/92, was at least twenty-four months younger than the defendant; and

Four, that this act occurred in the state of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. (CP 216; RP 363-64)

2. Did Mr. Jones receive ineffective assistance of counsel, who failed to secure an expert witness in support of the defense that multiple interviews of JJ and MJ created false memories of the alleged abuse? (Assignment of Error B).

II. STATEMENT OF THE CASE

Prior to Mr. Jones' first trial that ended in a hung jury, the judge, after having made discretionary rulings, denied his motion to disqualify/recuse. (CP 22, 41, 48).

On retrial, the same judge presided. Without objection, the State amended the charges numerous times. It eventually charged Mr. Jones by fifth amended information with one count of first degree rape of a child or, in the alternative, with one count of first degree child molestation against JJ; and with one count of first

degree rape of a child or, in the alternative, with one count of first degree child molestation against MJ. (CP 201; RP 301). These charges went to the jury. (RP 360-62).

JJ, born June 9, 1989, was Mr. Jones' granddaughter. (RP 123-24). The last time she had been alone with her grandfather was in Ephrata when she was about 10 years old. (RP 126). She used to visit her grandparents a couple of times every year. (RP 127). JJ stopped going by herself because she did not like the way Mr. Jones touched her. (*Id.*).

Although she could not remember the specific date or year, JJ said she rubbed Mr. Jones' penis while he rubbed her vagina as they were riding in his truck. (RP 127-28). When she was 7 or 8 years old, she took a bath with Mr. Jones at her grandparents' home in Ephrata. (RP 129). He washed her breasts, stomach and vagina. (*Id.*). Mr. Jones did not put anything in her vagina at this time. (*Id.*). When she was about 6 years old, he performed oral sex on JJ in his bedroom. (RP 131).

MJ, born April 16, 1992, was also a granddaughter of Mr. Jones. (RP 182-184). She last saw him at 12 years old. (RP 184). MJ said her grandfather molested her many times and had recollection of particular incidents. (RP 185).

When she was 8, MJ was in Mr. Jones' truck, where he had her squeeze his penis while he was driving. (RP 185-86). She was 9 and driving a truck in the fields when Mr. Jones put his finger inside her. (RP 187). When 10 years old, she got out of the shower and Mr. Jones performed oral sex on her. (RP 188-89).

MJ also said she had been sexually abused by her father. (RP 192). Her aunt Jeanne asked over some 4-5 years whether MJ had been abused by her grandfather. (RP 196).

Mr. Jones testified in his own behalf. He said no inappropriate conduct happened with JJ or MJ. (RP 319).

The jury convicted Mr. Jones of one count of first degree rape of a child against JJ and one count of first degree rape of a child against MJ. (CP 226, 228; RP 406). Although Mr. Jones sought an exceptional sentence downward, the court found there were no legal or factual reasons supporting such a departure. (RP 39). The court sentenced Mr. Jones within the standard range for each offense. (CP 311-33; RP 37-44). This appeal follows. (CP 338).

III. ARGUMENT

A. The court erred by giving Instruction 10, the to-convict instruction for first degree child rape against MJ, as it did not

specify the act relied on by the State to form the basis for the charge, thus allowing conviction on less than a unanimous verdict.

As to the counts involving MJ, the State argued:

You heard from [MJ], the same thing, [MJ] loved her grandparents. She told you about an incident in 2008 when they were in the truck, the defendant was driving, they were about 20 minutes from the house, the defendant grabbed her hand and had the victim squeeze his penis. That's molestation, ladies and gentlemen.

She told you about an act when she was nine when she was driving, her stepbrother was in the truck, the defendant was between the two of them, leaned forward, and put his finger in her vagina and moved it in and out. And that's intercourse.

She told you about an incident in 2002 when she was ten, when she came out of the shower, the defendant locked – closed and locked the door, closed the blinds, put her legs up, and as he was standing by the side of the bed, licked and kissed her vagina. And she was scared. (RP 378-79).

Instruction 10, the to-convict instruction for the charge of first child degree rape involving MJ, did not specify the act forming the basis for the charge. (CP 216). It just gave a time frame between April 16, 1997, to April 15, 2004, for the act of intercourse to have occurred. (*Id.*). Although no exception was taken to this instruction, the issue may nonetheless be raised for the first time on appeal because the failure to provide a unanimity instruction in a

multiple counts case can be manifest constitutional error. *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997), *review denied*, 134 Wn.2d 1002 (1998).

In multiple acts cases, the State is required to elect which act it is relying on for conviction. *State v. Workman*, 66 Wash. 292, 119 P. 751 (1911). In closing argument, the State elected the particular criminal act of first degree child rape against JJ (RP 377). With respect to MJ, the State argued the incident where Mr. Jones allegedly put his finger in her vagina when she was nine constituted intercourse. See *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). But there was another act that could have formed the basis for the charge – the 2002 incident where he allegedly performed oral sex on her.

The court also gave Instruction 7:

The State alleges that the defendant committed acts of rape of a child in the first degree or in the alternative, child molestation in the first degree involving MJ on multiple occasions in counts three and four.

To convict the defendant of rape of a child in the first degree . . . , one particular act of rape of a child in the first degree . . . must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree. . .

(CP 213; RP 361-62).

The evidence presented at trial, however, not only reflected the act against MJ elected by the State to form the basis for this charge (the vaginal penetration by a finger), but also the oral sex incident that could also have supported the charge. The State had already argued to the jury in the charges involving JJ that oral sex constituted intercourse. (RP 377). Thus, there were two alleged acts constituting intercourse, an element of child rape. Although it made an election as to the specific act against MJ, the State's continued reliance on the oral sex incident as an additional act supporting the child rape charge improperly allowed it to pursue conviction on multiple acts after it had already chosen which formed the basis for the charge. There can be no confidence in the verdict as to the child rape charge involving MJ because it cannot be said the jury unanimously agreed on vaginal penetration, the act elected by the State, rather than the oral sex that it continued to argue as an additional act of intercourse.

Generally, a unanimity instruction will cure the failure of the State to elect a particular act. *See State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). But here, the State chose a specific act and then relied on multiple acts to circumvent that

unanimity instruction. In these circumstances, it cannot be said the jury unanimously agreed on either the act of vaginal penetration or the act of oral sex to convict. Mr. Jones must be granted a new trial on the first degree child rape involving MJ.

B. Mr. Jones received ineffective assistance of counsel, who failed to secure an expert witness in support of the defense that multiple interviews of JJ and MJ created false memories of the alleged abuse.

Prior to testimony, defense counsel moved to have a hearing on implanted memory:

My motion would be to have a hearing to determine whether or not memory has been implanted in the young ladies by the number of statements. [MJ] gave statements to Detective Matney, Detective Bohnet, her aunt Jeannie [sic] and her mother, among other people. And there is a theory that especially in younger children, the more times statements are given, the more implanted a memory has become. Jeanne Stil was abused herself and may have implanted in [MJ] the fact that Mr. Jones had done something inappropriate. I haven't exactly found the case, but I do believe that to determine whether or not this memory is implanted, we should be entitled to a hearing. (RP 110).

Already concerned with the untimeliness of the motion, the court stated:

Also, you had mentioned yesterday you were aware of a case, but you haven't been able to cite it. And

this touches upon some issues that have been brought up in the past. I would state that, first of all, it would seem to me that to tie in this proposition of multiple interviews creating a false memory and therefore being dispositive before we even go to trial, versus letting the facts come out about all these different interviews to the jury for them to weigh as to the reliability, that a lot of this also touches upon appropriate areas for an expert to testify on as to how memory can be falsely created. And I believe at the last trial, I had cited many cases, including many out-of-state cases and law review articles or a law review article. But one case that keeps coming back as a nice summary of areas that can be touched upon with regards suggestibility of interviews creating false memories was the Wisconsin case of *Wisconsin v. Kirschbaum* . . . , 535 N.W.2d 462, a 1995 case.

There I believe there was a footnote, footnote two, that created a – or that was a summary of various areas from other states, reported decisions as to areas that could be touched upon with regards to expert testimony on whether certain interview techniques can create a false memory or misleading memory. I note that the request here is for a dispositive motion, that is, a request after the hearing then for the court to, I assume, dismiss charges, rather than having the jury hear what the different interviews consisted of and deciding themselves whether false memory was created.

So I think we've somewhat touched upon this in the past as to appropriate areas where experts can help a jury and areas where experts can help a jury and areas that experts can't be of assistance to the jury. We've gone through that at the previous trial that there were certain areas that an expert can't touch upon, such as vouching for the credibility of a witness. An expert can't do that. But instead certain interviewing techniques, such

as the use of leading questions or the pursuit by the interviewer of a preconceived notion or vilification of the defendant. Some of this might touch upon areas that an expert could testify. Also, they touch upon areas that a jury itself can hear. But primarily we're talking about a problem with being able to hear that today. And so I'll deny the request. (RP 112-13).

Defense counsel then stated, "[I]f an expert is needed, then maybe we should obtain one prior to Monday, which we could do."

(RP 113). The court replied:

The one situation you mentioned you need more time for was the request for a hearing on whether or not an alleged victim has been interviewed so many times and inappropriately that it created a false memory. You have had time for that. You've mentioned that there was a case yesterday afternoon, and I told you that you could come in today and cite the case, and you haven't cited the case yet. I do believe, though, to be fair, I did tell you that I would just allow you an offer of proof on it, but that we needed to start at nine because of the timeliness of it. But you've had time, if that was something you still want to pursue, you've had time over the evening and this morning to further cite the case and authority. (RP 116).

Counsel neither cited any case to the court nor obtained an expert witness on the issue of false memory.

To prove ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*,

466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A lawyer's performance is deficient if he made errors so serious that he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986). But the defendant need not show that counsel's deficient performance more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693.

Legitimate tactics or strategy will not support a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d. 563 (1996).

In light of the false memory defense proffered by counsel and the serious nature of the charges, effective assistance required securing an expert witness to evaluate the false memory issue and the evidence against Mr. Jones. *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010). In the first trial, the court recognized the necessity for an expert witness. (6/15/10 RP 5). Moreover, essentially on the representation of Mr. Jones' retained co-counsel that he could not provide effective assistance without meaningful

expert testimony, the court allowed co-counsel to withdraw on the eve of the first trial. (9/21/10 RP 12). At retrial, the court again recognized and commented on the importance of expert witness testimony to support the false memory defense. (RP 112-13, 116).

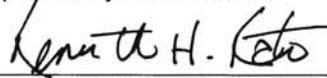
Counsel did not timely make his motion for a hearing on the defense and did not obtain an expert even though he had the time and opportunity to do both, as noted by the court. The failure to do either was not trial strategy or tactics. Rather, it was ineffective assistance when counsel failed to secure an expert witness to testify in support of the false memory defense. *A.N.J.*, 168 Wn.2d at 112. As recognized by the court, the defense was beyond the common knowledge of jurors and an area where expert testimony was necessary and helpful. (RP 112-13). Furthermore, defense counsel failed to timely make the motion for a hearing on the defense. In these circumstances, counsel's errors were so serious as to deprive Mr. Jones of a fair trial. *Jeffries*, 105 Wn.2d at 418. A new trial is warranted.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Jones respectfully urges this Court to reverse his convictions of first degree child rape and remand for new trial.

DATED this 2nd day of April, 2012.

Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on April 2, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Jack Glyn Jones, # 349401, Airway Heights C.C., PO Box 1899, Airway Heights, WA 99001; and by e-mail, as agreed by counsel, on D. Angus Lee, Grant County Prosecutor, on kburns@co.grant.wa.us.

