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Court of Appeals
Division III
State of Washington

NO. 30253-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

JACK GLYN JONES,

APPELLANT.

RESPONDENT'S BRIEF

D. ANGUS LEE
PROSECUTING ATTORNEY

By: Carole L. Highland, WSBA #20504
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney's Office, is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and Appellant's convictions must be affirmed.

III. ISSUES

1. Whether the inclusion of a *Petrich* instruction was error when the jury heard testimony regarding multiple acts, any one of which could have constituted the charged crimes.
2. Whether trial counsel's performance was deficient, and if so, whether trial counsel's deficient performance prejudiced Appellant's defense.
3. Whether the Court allowed one of the case detectives, now retired, to serve as a volunteer bailiff in Appellant's trial.
4. Whether Appellant's speedy trial rights were violated when the case was continued numerous times.

IV. STATEMENT OF THE CASE

Appellant, Jack Jones was convicted on May 6, 2011 of two counts of Rape of a Child in the First Degree involving his granddaughters, J.J. and M.J. RP 299, 362, 363, 406. Appellant had also been charged with an alternate count of Child Molestation in the First Degree involving each girl, as well as an alternate count of Rape of a Child in the Second Degree involving M.J. which was later dismissed as all of M.J.'s testimony involved acts which occurred when she was under the age of 12. RP 3, 4, 9, 301.

J.J., who was born on June 9, 1989, testified that between the ages of five and ten, she would stay with her grandparents in Ephrata during the summer. RP 124, 126, 127. J.J. testified that she had stopped going to her grandparents because she didn't like the way the appellant, her grandfather, had touched her. RP 127. J.J. testified that during road trips, the appellant would have J.J. touch his penis, or would rub her vagina. *Id.* J.J. recounted a specific incident in which they had driven to the middle of nowhere in Mr. Jones' truck as a police car was following them. Appellant had told

J.J. not to turn around or to attract the officer's attention, during which time he was having her rub his penis and he was rubbing the inside of her legs and vagina. RP 127, 128. According to J.J., she had repeatedly looked back so that they might be pulled over while the appellant had only told her to just look ahead. RP 128.

J.J. also testified that Mr. Jones had had J.J. take a bath with him when she was approximately seven or eight years old. RP 129. Appellant had had J.J. sit on his lap while he washed her neck, breasts, stomach, and vagina with a washcloth. The appellant had not put anything into her vagina during this incident. *Id.* J.J. had told her grandmother about this incident later the same week, but according to J.J., her grandmother had thought that J.J. was just joking. RP 130.

J.J. also testified about an incident when her grandmother was gone, and the appellant had laid her on the bed, pulled down her pants, and then performed oral sex on her by both putting his tongue and mouth around her vagina and licking it, as well as rubbing her clitoris. RP 130, 131. J.J.

estimated that she was around six when this incident happened. RP 131.

J.J. also testified about another incident in a RV which had been terminated when Mr. Jones thought that he had heard someone coming. RP 131, 132.

J.J. stopped going to see her grandparents when she was about ten. RP 132. At that time she told her Aunt Angel what had been going on. RP 133, 138. Her aunt told her parents, but they didn't believe her when they heard her allegations. RP 132,133. J.J. testified that she never had contact alone with her grandfather after this time. RP 133.

J.J. began seeing a counselor in 2008, when she was 18 years old because she was very upset, and didn't understand why no one believed her when she told about the molestation committed by appellant. RP 133, 139, 152. According to J.J., she had first told her grandmother, then told her Aunt Angel, who in turn told her parents, had spoken with her mother once while they were driving, and had then told her counselor. RP 138, 139, 141, 142. It was the counselor who reported the

abuse to law enforcement. RP 162. J.J. was 18 or 19 in 2008 when she first gave a statement to Detective Bohnet. RP 149.

J.J. also spoke of the guilt that she felt by not preventing what had happened to her cousin, M.J. RP 134, 152. J.J. stated "because I felt if I would have said something and really, really tried harder, then maybe she wouldn't have gone through this stuff too." RP 134. It was not until a couple of years before trial in 2011 that J.J. learned that M.J. was also alleging that she too had been sexually abused by the appellant. RP 134, 162.

J.J. indicated that the cousins had had very little contact with each other through the years, although they had communicated after the first trial about matters unrelated to the case. RP 135, 143, 144.

M.J., who was born April 16, 1992, testified that she had stayed with her grandparents in Ephrata during the summer from the time that she was a baby until she was 12 years of age. RP 185, 184. It was M.J.'s testimony that she stopped visiting them because of the molestation by her grandfather which had happened too many times to count. RP 185.

M.J. testified of an incident that had occurred when she was about eight. *Id.* M.J. related that they had been driving in the appellant's truck when he grabbed her hand, put it down his pants, and made her touch and squeeze his penis. RP 185, 186.

M.J. testified about another incident that had occurred in the truck when she was about nine. RP 187. During that occasion, M.J. had been driving, and the appellant put his hand down her pants and pushed his finger in and out of her vagina. RP 187, 188.

M.J. went on to testify about an incident when the appellant had performed oral sex on her after she had come out of the shower and he had placed her on the bed after closing the blinds and closing and locking the door. RP 188, 189, 232.

M.J. testified that after having found her diary, M.J.'s Aunt Jeanne had repeatedly asked her whether or not M.J. was being sexually abused by her grandfather. RP 190. M.J. stated that she had told her Aunt Jeanne "no", but that after having been asked more times than she could count, M.J. had

told first her aunt, and then her mother about the abuse. RP 190, 191, 194, 196. It was M.J.'s testimony that her Aunt Jeanne had not ever told M.J. what to say. RP 190.

When M.J.'s mother, Marlee Johnston, learned about the abuse, she contacted the Ephrata Police Department, and then had M.J., who was 12 at the time, examined at the sexual assault center at Providence Hospital in Everett. RP 190, 191, 239.

Paula Skomski, the forensic nurse examiner at Providence Intervention Center for Assault and Abuse testified that she had been the nurse who had examined M.J. on August 25, 2004. RP 246, 247. Ms. Skomski testified that an initial part of the examination of the patient is to obtain a history from the patient as to what had happened. M.J. had told Ms. Skomski:

> My grandpa told me not to tell or he would get in trouble. He put his middle finger inside me and touched me under my clothes. He did this while I slept on the floor next to grandma's bed, but he slept in another room. My dad touched me in the same way when I slept on the futon under my brother's bed while he slept. I tried to push him away, but I couldn't. I tried to talk loud so my brother would wake up, but dad told me to be quiet and

> go back to sleep. Grandpa tried to bribe me with money sometimes to let him touch me. He made me touch his private parts, his penis, and he made me kiss him. RP 251, 252. (M.J. also testified that her father, Ron Jones, had previously abused her three times). RP 190, 191.

M.J. went on to tell Ms. Skomski that this activity between herself and her grandfather had been going on for as long as she could remember, and that the last incident had occurred two weeks previously. RP 252. Ms. Skomski was unaware of any additional visits that M.J. may have made to the hospital. RP 260.

M.J. had also written a poem in her diary called "She Just Wants to Die" which M.J. said she had written because she was hurting inside, she wanted to escape, and she didn't want to be here. RP 231. M.J. testified that she had tried to kill herself when she was 14 or 15 for many of the same reasons. RP 235. Ms. Skomski testified that she had had M.J. sign a safety plan and no harm contract agreeing that she would call someone if she was thinking of harming or killing herself. RP 256. Ms. Skomski testified that these contracts were not entered into with every patient who she examined, but just those who had mentioned thoughts of self-harm. *Id.*

M.J.'s mother, Marlee Johnston, testified that M.J. had begun to show a reluctance to visit her grandparents about a year before she had learned of M.J.'s allegations. RP 240.

M.J. testified that she told her aunt and her mother about the abuse. M.J. had not told her grandmother because she didn't think that she would believe her. RP 190. M.J. had not been engaged in counseling at the time of her disclosures. RP 196, 243. There was no testimony of any intervening counseling. M.J. had been interviewed by Detective Matney and a prosecutor in 2004 when the incidents first came to light. RP 203, 204.

M.J. testified that during this period of time, her contact with her cousin, J.J. was sporadic, occurred only when the two of them were in Ephrata at their grandparents', and never involved discussing the sexual abuse that was happening to either of the girls. RP 191. It wasn't until three or four years prior to the 2011 trial when M.J. had first learned that J.J. had made similar allegations regarding their grandfather. RP 233. M.J.'s mother reiterated that the only time that the two girls ever

spent time together was when they were at their grandparents' home together. RP 244.

V. ARGUMENT

A. THE INCLUSION OF A *PETRICH* INSTRUCTION WAS NOT ERROR WHEN THE JURY HEARD TESTIMONY REGARDING MUTIPLE ACTS, ANY ONE OF WHICH COULD HAVE CONSTITUTED THE CHARGED CRIMES.

Washington Pattern Jury Instruction 4.25 is derived from *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), in which the defendant was charged with indecent liberties and second degree statutory rape of his granddaughter. At trial, numerous incidents of sexual contact were described. The defendant moved to compel the State to elect which act(s) it was relying upon for conviction. Defendant's motion was denied and the defendant was convicted. The Washington State Supreme Court, in overturning the defendant's convictions, said that either the State should have been required to elect the act upon which it was relying upon for conviction, or, in the alternative, that the jury needed to have been instructed that all 12 of them were required to agree that the same underlying criminal act had been proven beyond a reasonable doubt.

WPIC 4.25 JURY UNANIMITY – SEVERAL DISTINCT CRIMINAL ACTS – *PETRICH* INSTRUCTION reads as follows:

The [State] [County] [City] alleges that the defendant committed acts of _____ on multiple occasions. To convict the defendant [on any count] of _____, one particular act of _____ 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 _____. (The blanks are for the identified crime).

Jury instruction seven in this case read as follows:

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 JJ on multiple occasions in counts one and two.

To convict the defendant of rape of a child in the first degree or in the alternative, child molestation in the first degree in counts one and two, one particular act of rape of a child in the first degree or in the alternative, one particular act of child molestation 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 or in the alternative, child molestation in the first degree.

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 or in the alternative, child molestation in the first degree in counts three and four, one particular act of rape of a child in the first degree or in the alternative, one particular act of child molestation 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 or in the alternative, child molestation in the first degree. RP 360-362.

A *Petrich* instruction provides a defendant with the constitutional protection of a unanimous verdict when the State chooses not to elect a specific act upon which to proceed. Often in rape of a child/child molestation cases, the abuse is ongoing and ranges for a period of multiple years. M.J. told the court that she had been sexually molested by the appellant too many times to count. RP 185.

Appellant's argument that the State made an election in closing argument of which act it was proceeding on has no support in either law or fact. An election would be a charging decision reflected in the information itself. That was not done here. The appellant was charged with having committed the act of Rape of a Child in the First Degree or in the alternative, Child Molestation in the First Degree for each of the two victims with an allegation that the unlawful conduct had spanned a number of years. Failing to elect which act that the State was relying upon, and the jury having heard of multiple acts, a unanimity instruction was critical and appropriately provided to the jury. What appellant seems to classify as an election was

the deputy prosecutor in her closing reiterating the testimony of the two young women, and identifying whether the acts as testified to would fall into either the definition of intercourse or molestation. The jurors were told twice, both before proceedings began, and then before closing arguments, that the counsel's remarks are not evidence. RP 74, 356. Jurors are presumed to follow jury instructions. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007), *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994), *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976).

The provision of a *Petrich* instruction in the light of the State's decision not to elect the specific act upon which to charge the appellant provided appellant with the constitutional protection of jury unanimity in its verdicts.

B. TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, BUT IF IT WAS, APPELLANT FAILS TO SHOW HOW COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE.

In *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984), the court articulated the two prong test for effective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. The *Strickland* test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. *Strickland* at 688. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.

To prevail on an ineffective assistance of counsel claim, appellant must show both an ineffective representation and resulting prejudice. *In re Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert.denied*, 506 U.S. 958, 121 L.Ed. 2d 344, 113 S.Ct. 421 (1992). In *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), the Court stated:

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 S.Ct. 2052

> (1984). Competency of counsel is determined upon the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). *McFarland* at 334-335.
>
> A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. *State v. Tarcia*, 59 Wn.App. 368, 374, 798 P.2d 296 (1990), *State v. Fredrick*, 45 Wn.App. 916, 729 P2d 56 (1986).

Regarding the first prong, scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness. *Strickland* at 689, *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).

Appellant argues that he was prejudiced due to his trial counsel's failure to procure an expert witness who would have supported the defense that multiple interviews of J.J. and M.J. created false memories of the abuse.

In *State v. Willis*, 151 Wn.2d 255, 87 P.3d 1164 (2004), the court held that the exclusion of a witness regarding the use of child witness interview techniques was not an abuse of discretion. In *Willis*, the court hewed to its conclusion in *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), that the general principle that younger children are more susceptible to suggestion is well within the understanding of the jury, but also

agree that specialized knowledge regarding the effects of specific interviewing techniques and protocols in sexual abuse cases would not be within the common experience of a jury.

In *State v. Downing*, 151 Wn.2d 265, 87 P.3d 1169 (2004),the trial court did not abuse its discretion in denying defendant's motion for a continuance in order to secure expert testimony for the express purpose of reconsidering the trial court's ruling that the victim was competent to testify where the expert's testimony would not change the fact that the victim's statements before and after the potentially tainting contact with other victims were consistent, and reconsideration of competency to testify would not likely have led to a different result based upon the expert's testimony.

In the instant case, the disclosure of each victim's report of sexual abuse by the appellant came about in very different and separate situations. J.J., who had been sexually abused between 1994 and 1999, when she was between the ages of five and ten, testified that she had first disclosed the sexual abuse to the appellant's wife after the incident with the appellant in the bathtub when J.J. was approximately seven to

eight years of age. According to J.J., her grandmother had not believed her and thought that J.J. was joking. J.J. then disclosed to her Aunt Angel, who disclosed to J.J.'s parents who also failed to believe her. It wasn't until approximately 2007, when J.J. was 18 years old and seeing a counselor, in part because of the sexual abuse, that the report of her abuse was made public, and J.J. first spoke to police.

M.J. testified that she had first disclosed the sexual abuse to her Aunt Jeannie who had repeatedly asked her if her grandfather had sexually abused her. According to M.J. this had occurred when she was about 12 years of age. M.J. also testified that she had not told school counselors about the abuse, but had told the sexual assault nurse examiner, Paula Skomski, when M.J.'s mother had taken her to Providence Hospital in 2004.

Neither of the young women had disclosed to or was interviewed by anyone to whom the other young woman had disclosed to or been interviewed by.

Both young women testified that they were not particularly close to each other while these events were

occurring, and did not learn of each other's abuse by their grandfather until approximately 2007.

While M.J.'s testimony that her Aunt Jeanne had asked her repeatedly whether or not her grandfather had abused her could be somewhat concerning, the fact that M.J. also testified that her Aunt had not told her what to say would belie an assertion of the implantation of false memory regarding the specifics of the alleged abuse.

Although it was not until approximately 2007 or 2008 that each young lady learned of the other's sexual abuse by their grandfather, they each testified to very similar scenarios involving an act of their grandfather performing oral sex on each of them after having bathed, as well as similar memories of inappropriate sexual contact during drives in the appellant's truck.

As there were no repeated interviews of either girl, Dr. Stanilus' testimony would not have helped the trier of fact regarding that theory of false memory implementation.

While trial counsel was unable to articulate why the expert was not available to testify, appellant is unable to articulate what it is Dr. Stanilus could have testified to that would have assisted the jury, or how he was prejudiced when the jury heard similar accounts from two victims who had had little contact with each other, had been minimally interviewed, had disclosed to and been interviewed by completely different people, and had been 12 and 18 years of age at the time of their first interview.

C. THE COURT DID NOT ALLOW ONE OF THE CASE DETECTIVES, NOW RETIRED, TO SERVE AS A VOLUNTEER BAILIFF IN APPELLANT'S TRIAL.

Appellant asserts that David Matney, who had previously been employed by the Grant County Sheriff's Office, and who had in fact interviewed M.J. as part of this specific incident, acted as a volunteer bailiff in this matter. To the contrary, the record shows that the issue of having Mr. Matney act as a volunteer bailiff was rejected due to concerns about the appearance of fairness. RP 81, 82, 84, 85.

D. APPELLANT FAILS TO SHOW THAT HIS SPEEDY TRIAL RIGHTS WERE VIOLATED WHEN HE FAILS TO POINT TO ANY PLACE IN THE RECORD WHEN HE OBJECTED TO A CONTINUANCE.

Appellant asserts that his speedy trial rights were violated but can point to no place in the record at which he objected to a continuance. Without a specific cite in the record to respond to, the State is unable to address appellant's concern.

VI. CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny Jones' appeal and affirm his convictions.

DATED THIS 4th day of June, 2012.

Respectfully submitted:

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. JACK GLYN JONES, Appellant.	))))))))))	No. 30253-9-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Respondent's Brief in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kenneth H. Kato
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That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

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Dated: June 4, 2012.

Carole L. Highland

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