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Court of Appeals
Division III
State of Washington

NO. 31607-6-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JASON ALLEN FRENCH, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00260-1

BRIEF OF RESPONDENT

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I. ANSWER TO ASSIGNMENT OF ERROR

1. **Since the “to-convict” instruction allowed the jury to rely on information prior to March 17, 2009, this matter should be reversed and remanded for a new trial as to the conviction of Count 2 - Communication with a Minor for Immoral Purposes only.**
2. **The no-contact order should have been limited to ten years instead of life; therefore, this matter should be remanded in order to modify the no-contact order.**
3. **The trial court did not err by imposing Legal Financial Obligations on the defendant.**
4. **The trial court did not err by mandating HIV testing when the defendant was convicted of a drug offense associated with the use of hypodermic needles.**
5. **The defendant was not denied effective assistance of counsel at trial or at sentencing.**

II. STATEMENT OF THE CASE

The Statement of Case included in the Appellant’s Brief at pages two through six adequately states the facts relevant to the first four issues presented by defense counsel. The following facts are helpful for a complete examination of the ineffective assistance of counsel claim.

At the March 24, 2011, arraignment, Attorney Dan Arnold was appointed by the court to represent the defendant. (RP 3/24/11 at 2). Mr. Arnold represented the defendant until December of 2012, when the defendant indicated he was uncomfortable going forward with Mr. Arnold.

(RP 12/6/12 at 32). Alexandria Sheridan subsequently appeared for the defendant on January 31, 2013, and proceeded to trial and sentencing with him. (RP 01/31/2013).

At trial, Detective Cantu's interview with the defendant was made part of the record and a transcript was provided to the jury so they could follow along with the recording. (Ex. 34-Transcript; RP¹ at 141-42, 167-68). During the interview, the defendant admitted, among other things, to giving each victim marijuana, using marijuana with each victim, possessing marijuana in his home, using methamphetamine with N.L.H., providing methamphetamine to N.L.H., taking a naked photo of N.L.H. in his bathtub when she was 14 or 15 years old, and having sex with N.L.H. on two separate occasions. (*See* Ex. 34-Transcript). Defense counsel cross-examined both victims, as well as Detective Cantu, and under advisement from counsel, the defendant did not testify. (RP at 64-65, 172-73, 207-08, 228).

At closing, defense counsel's argument focused primarily on the alleged inconsistencies of the State witnesses' direct testimony. (RP at 267-75). During various points in closing, defense counsel utilized the answers she obtained from K.D.M. and N.L.H. to support the defense

¹ Unless otherwise dated, RP refers to the Verbatim Reports of Proceedings of April 9-11, 2013 and April 22, 2013, reported by Cheryl A. Pelletier.

theory that the victims' stories did not support one another and the overall story was fabricated. (RP at 267-76). Defense counsel pointed out perceived discrepancies between each victim's account of the events and urged the jury to compare their stories "side by side." (RP at 271). Another defense argument suggested that the victims obtained the drugs from N.L.H.'s father, and this whole story was created to avoid getting the family into trouble. (RP at 272). In addition, defense counsel discussed the interview with Detective Cantu and attempted to cast it in an oppressive light. (RP at 271-74).

III. ARGUMENT

1. **Since the jury could have relied on information prior to March 17, 2009, this matter should be reversed and remanded for a new trial as to Count 2 only – Communication with a Minor for Immoral Purposes only.**

In light of the defendant's argument, the State would ask the Court to remand this matter for a new trial as to Count 2 only - Communication with a Minor for Immoral Purposes. The defendant's assertion that the jury instruction did not allow the jury to identify when the violation occurred is correct. The two year statute of limitations required a finding of a violation between March 16, 2009, and March 11, 2011, while the

“to-convict” instruction encompassed the time period of October 17, 2007, to October 16, 2010. RCW 9.68A.080(1) (CP 177).

Reversal and remand is required when the “to-convict instruction permits the jury to convict the defendant based solely upon acts committed beyond the statutory limitation period.” *State v. Dash*, 163 Wn. App. 63, 65, 259 P.3d 319 (2011) (*distinguished* on other grounds by *State v. Peltier*, 176 Wn. App 732, 738-40, 309 P.3d 506 as corrected (Oct. 23, 2013)); *See also State v. Aho*, 137 Wn.2d 736, 744, 975 P.2d 512 (1999) (where the court reversed a conviction because of the possibility that the jury based their verdict on acts that occurred prior to the effective date of a child molestation statute). Here the defendant unequivocally agrees that he took a naked photograph of the defendant while she was in his bathtub. (Ex. 34-Transcript at 12 of 16).

The record shows that this naked photo and bathtub incident occurred during the victim’s 9th grade year, thus placing it between September 2009 and June 2010. (Ex. 34-Transcript at 12 of 16; RP 191-92, 96-97, 263). This period was within the statute of limitations; however, the jury did not specify a date which it relied upon in reaching its decision. Consequently, despite the State properly presenting evidence that an undisputed communication occurred within the relevant limitation period, the jury did not identify which act or date it relied upon in

convicting the defendant. (CP 175; Ex. 34-Transcript at 12 of 16; *See* RP at 191, 196-97, 263).

Thus, the proper remedy here is not dismissal as the defendant asks, but reversal and remand for a new trial on Count 2 - Communication with a Minor for Immoral Purposes only. *Dash*, 163 Wn. App. at 65; *Aho*, 137 Wn.2d at 744. The State respectfully asks this Court to remand this issue for a new trial as to Count 2 - Communication with a Minor for Immoral Purposes only.

2. The no-contact order as to K.D.M should be modified to ten years.

The no-contact order as to K.D.M should be modified to conform to the maximum penalty allowed under RCW 69.50.406(2). The relevant portion of the statute states:

(2) Any person eighteen years of age or over who violates RCW 69.50.401 by distributing any other controlled substance listed in Schedules I, II, III, IV, and V to a person under eighteen years of age who is at least three years his or her junior is guilty of a class B felony punishable by the fine authorized by RCW 69.50.401(2)(c), (d), or (e), by a term of imprisonment up to twice that authorized by RCW 69.50.401(2)(c), (d), or (e), or both.

RCW 69.50.406(2).

Consequently, the maximum penalty for violation of this statute is ten years. *See* RCW 69.50.401(2)(c); RCW 9A.20.021(b), (c). The State agrees that the imposition of a lifetime no-contact order as to K.D.M. was incorrect. The State respectfully asks this Court to remand the no-contact order so it can be modified to ten years.

3. The imposition of Legal Financial Obligations was proper, and, in absence of affirmative evidence to the contrary, is not subject to review until the State begins enforcement.

The defendant's challenge to the Legal Financial Obligations (hereinafter LFOs) should be denied for two reasons. First, it is not properly before the Court, and second, it is not ripe for review. RAP 2.5(a), 3.1. This challenge is improper, because the defendant failed to preserve this issue below and now raises it without an adequate basis for the first time on appeal. RAP 2.5(a). In order to assert a constitutional claim for the first time on appeal, the defendant must raise at least one of three issues: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." *Id.* The defendant here has not shown any of these and, based on the facts of this case, he cannot do so. The defendant does

not state a basis on which his argument rests; therefore, the State is left to assume that his claim is a constitutional one.

A sentencing court's consideration of the defendant's ability to pay is not constitutionally required; thus, the defendant has failed to raise an error of constitutional magnitude on appeal. *State v. Blank*, 131 Wn.2d 230, 241–42, 930 P.2d 1213 (1997) (“the Constitution does not require an inquiry into ability to pay at the time of sentencing.”); *State v. Calvin*, ___ Wn. App. ___, 316 P.3d 496 (2013), as amended on reconsideration (Oct. 22, 2013). Since the defendant did not object to the imposition of LFOs at sentencing, and since he has he failed to show that the State started enforcement of the LFOs, this argument is not properly before the Court. As a result, the defendant’s claim should be dismissed.

Second and more importantly, because the State has not yet enforced the LFOs, this issue is not ripe for review. *State v. Lundy*, 176 Wn. App. 96, 107, 308 P.3d 755 (2013). Generally, challenges to orders establishing LFOs are not ripe for review until the State attempts to enforce them. *Id.* A defendant’s indigence at the time of sentencing does not bar the imposition of court costs, and an “[i]nquiry into the defendant’s ability to pay is appropriate only when the State enforces collection under the judgment . . .” *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). As a result, this issue is not ripe for review and

should be addressed only when it becomes so. *See State v. Smits*, 152 Wn. App. 514, 517, 216 P.3d 1097 (2009). Since the defendant cannot show that he is an aggrieved party under RAP 3.1, review is likewise improper. *See id.*

As the *Blank* Court recognized, “common sense dictates that a determination of ability to pay and an inquiry into defendant’s finances is not required before a recoupment order may be entered against an indigent defendant . . .” *Blank*, 131 Wn.2d at 242. The defendant relies on *State v. Bertrand* to support his challenge; however, that reliance is misplaced. (App. Brief at 12). In *Bertrand*, the Appellate Court accepted review under RAP 2.5, noting that the defendant demonstrated disability and was unable to pay the LFOs at the present time or in the future. *State v. Bertrand*, 165 Wn. App. 393, 404 n.15, 267 P.3d 511 (2011); *See also State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *Review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013). The defendant here does not make such a claim, nor does the record support one.

As a basis for appeal, the defendant here notes that paragraph 2.5 in the Judgment and Sentence is not checked. (App. Brief at 11; CP 202). However, the presence or absence of such a finding has no bearing on the imposition of LFOs at sentencing. To the contrary, the unchecked box here merely indicates that a finding of the defendant’s ability to pay was

not entered at that time; thus, this issue is not ripe for review. Even if the court had checked paragraph 2.5 and found that the defendant was able to pay, it would still not require reversal. *Calvin*, 316 P.3d 496 (stating a boilerplate finding is “unnecessary surplusage”); *Lundy*, 176 Wn. App at 103. Like in *Bertrand*, the *Calvin* Court held that, where the record failed to affirmatively show the defendant’s “inability to pay both at present and in the future,” reversal was not warranted. *Calvin*, 316 P.3d 496. The proper inquiry at sentencing is not whether the defendant had the ability to pay, but whether in light of the record the defendant’s inability to pay is affirmatively shown. *See Id.*; *Bertrand*, 165 Wn. App. at 404 n.15.

Finally, as subsequent courts have noted, *Bertrand* did not distinguish between mandatory LFOs (those that do not require any inquiry) and discretionary LFOs (those that may require inquiry at the time of enforcement). The defendant here likewise failed to distinguish between LFOs which were mandatorily imposed and those which were discretionary. In this matter, the \$500.00 victim assessment is mandatorily required under RCW 7.68.035(1)(a) and was properly assessed regardless of the defendant’s ability to pay. *See State v. Curry*, 62 Wn. App. 676, 681, 814 P.2d 1252 (1991). Similarly, the \$100.00 DNA collection fee was required under RCW 43.43.7541, and properly assessed regardless of the defendant’s ability to pay. *See State v. Thompson*, 153 Wn. App. 325,

336, 223 P.3d 1165 (2009) (noting that the legislature specifically omitted language that would require an inquiry into the defendant's financial status). The \$200.00 filing fee is also mandatory pursuant to RCW 36.18.020(2)(h).

As discussed above, the LFOs which were discretionary are not subject for review until they are enforced. When that time comes, section (3) and (4) of RCW 10.01.160 provides protections for the defendant, in the event he is unable to pay the discretionary LFOs. The defendant does not allege any action by the State in attempting to collect payment or impose sanctions for non-payment of his LFOs. Because there is no allegation of collection or sanction, there is no need to address the defendant's current ability to pay.

Unlike the defendant in *Bertrand*, the record here does not support the finding that the defendant has a present and future inability to pay LFOs. At the time of sentencing, the defendant was 36 years old and otherwise able-bodied. Since he was going to prison, where viable job prospects are non-existent, it does not make sense to make a determination of ability to pay at this time. Furthermore, no evidence has been presented thus far that would suggest at the time of release that a then 42 year-old defendant will be unable to pay his LFOs.

4. The sentencing requirement imposing HIV testing should be remanded for a determination that the drug offense is one associated with hypodermic needles.

The defendant's argument necessarily implicates how the determination requirement under RCW 70.24.340(1)(c) should be construed.

In relevant part, the statute requiring HIV testing states:

(1) Local health departments authorized under this chapter shall conduct or cause to be conducted pretest counseling, HIV testing, and posttest counseling of all persons:

....

(c) Convicted of drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one *associated with* the use of hypodermic needles.

RCW 70.24.340(1)(c) (emphasis added).

The defendant is essentially arguing that the application of section (c) should be so limited as to only apply to offenses that *involved* the use of hypodermic needles. The problem with this construction is that it neglects to take into account the legislature's intent that this statute acts as a prophylactic against the transmission of serious and fatal diseases that are transmitted both sexually and through drug use. RCW 70.24.015. The statute clearly does not require a restrictive inquiry that hypodermic needles be "involved" in the particular offense, as the defendant seems to

suggest, but instead that the drug offense be one “associated” with the use of hypodermic needles. RCW 70.24.340(1)(c).

While no published opinion has yet interpreted the meaning of section (c), two unpublished opinions are informative and contrast the potential constructions given to section (c).² In *State v. Miller*, Division Two of this Court concluded that “[t]he statute does not require findings or even a determination on the record.” *State v. Miller*, 105 Wn. App. 1044, 2001 WL 333818 at 2. The Court further concluded that “[i]t is evident that the delivery of heroin is a crime ‘associated with the use of hypodermic needles,’” thus testing was properly imposed. *Id.*

This possible interpretation of the statute would require the trial court here to determine whether or not the distribution of methamphetamine or marijuana is a drug offense “associated with the use of hypodermic needles.” *See id.* Once that determination is made, then the court could impose HIV testing. Under this rationale, the court here could have found that the defendant’s use and delivery of methamphetamine is a drug offense associated with the use of hypodermic needles. Under a *Miller* type interpretation, the fact the court ordered testing shows that it

² The State is well aware that these opinions are unpublished and they are thus presented only for informative purposes and not relied upon as precedent. Last year, this Court similarly issued an unpublished opinion where, without reaching the issue on the merits, recognized the presence of two possible interpretations of RCW 70.24.340(1)(c). *State v. Miller*, 170 Wn. App. 1051, 2012 WL 4364612 at 3 n.1.

made a determination that delivery of methamphetamine is a drug offense associated with the use of hypodermic needles.

Conversely, a subsequent unpublished opinion by the same Division of this Court held that actual evidence must link a particular defendant's conviction to the use of hypodermic needles. *State v. Perry*, 116 Wn. App. 1031, 2003 WL 1775990 at 1. The distinction under this interpretation is that the Court's analysis is personal to the defendant's particular offense, as opposed to a drug offense as a larger category. So, under the *Perry* rationale, even if the primary mode of ingestion of a particular drug is through the use of hypodermic needles, the trial court would need evidence that the defendant here actually used a hypodermic needle in commission of the offense. This standard is far too restrictive and inflexible given the emergent goals that the statute was designed to meet. RCW 70.24.015. It has the practical effect of taking the terms "associated with" and replacing them with "which involved."

Accordingly, the State is asking this Court to approve of an interpretation like the one articulated by the *Miller* Court. It is generally known and accepted that methamphetamine can be consumed via a variety of methods, and its use is often associated with hypodermic needles. As a result, this type of drug offense presents a particularly dangerous public health risk beyond that of alcohol or marijuana use, because it can and

often does progress to the point of intravenous injections. The statute here clearly covers this type of drug offense, and empowers the Court to make a determination that HIV testing is warranted.

5. The defendant was not denied effective assistance of counsel, because defense counsel's performance constituted conceivable legitimate trial strategy and tactics.

Since the State concedes that the conviction for Count 2 only - Communication with a Minor for Immoral Purposes should be reversed and remanded, we therefore only address the defendant's claim as to defense counsel's performance during the trial at large. (*See App. Brief at 13*).

When evaluating an ineffective assistance claim, Appellate Courts engage in a strong presumption that representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail, the defendant must show:

(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.

Id. at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Furthermore, “[b]ecause the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336. As a result, the defendant here must show that defense counsel’s actions in not cross-examining certain witnesses or only asking certain questions falls outside of a “conceivable” tactic or strategy. *Id.*; *See also State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (where the court held an all or nothing approach to jury instructions “was at least conceivably a legitimate strategy to secure an acquittal.”). The defendant here fails to meet that burden.

It is not enough for the defendant to show that defense counsel did not cross-examine every witness to his satisfaction or did not ask certain questions of each witness. Instead, he must show that there was no conceivable reason for counsel to refrain from asking certain questions or only focusing on certain issues. It is not enough to say that, because defense counsel pursued a certain strategy, her performance was deficient. An unsuccessful outcome or failure of a strategy is “immaterial to an assessment of defense counsel’s initial calculus; hindsight has no place in

an ineffective assistance analysis.” *Grier*, 171 Wn.2d at 43. The defendant here is using hindsight to attack defense counsel’s performance.

The defendant gives a general accusation that defense counsel failed to adequately cross-examine witnesses, and thus did not zealously represent the defendant. (App. Brief at 13-14). The defendant argues that this indicates defense counsel “did not have a comprehensive understanding of the nature of the case and a means to provide an effective defense.” (App. Brief at 14). This blanket assumption ignores any number of possible tactics and trial strategies that defense counsel may have been pursuing.

A possible tactic that the defendant did not consider is that defense counsel thought it best not to ask more questions of the witnesses. The extent of cross-examination is a matter of judgment and strategy, and as such clearly falls to defense counsel. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (dismissing a defendant’s argument that essentially amounted to “trial counsel could have done a better job at cross-examination”). Another possible tactic defense counsel may have been pursuing was to attack the credibility of the State’s witnesses based on their direct examination testimony and during closing argument, focus on the purported inconsistencies brought about by the State’s own questioning. (RP at 267-75).

Yet another possible strategy and tactic is that, in light of her client's numerous admissions to Detective Cantu, defense counsel did not want to further damage her client's credibility through rigorous cross-examination of facts not in contention. (*See* Ex. 34-Transcript). The defendant here had already stated that he supplied marijuana and methamphetamine to the victims, used the drugs with them, possessed drugs in his home, and took a naked photo of an underage N.L.H. in his bathtub. (*See* Ex. 34-Transcript). Given the defendant's admissions, defense counsel could have been balancing the precarious interests of either blatantly contradicting her client's previous statements, or embracing them and minimizing them to his benefit on closing. Defense counsel's questions directed at K.D.M. and Detective Cantu suggest that she may have been using this strategy to cast doubt on the veracity and credibility of the State's witnesses. (RP at 64-65, 172-73). These are only a few examples of possible strategies and tactics, but there is any number of others left unmentioned.

At closing, defense counsel vigorously argued that the victims' stories did not match up, and referenced the answers given by K.D.M on cross examination. (RP at 269). She also attempted to paint the interview with Detective Cantu in a negative light by discussing the Detective's demeanor toward the defendant during the questioning. (RP at 271-74).

Defense counsel also offered an alternative theory for how the victims obtained the drugs. (RP at 272). Defense counsel consistently attacked the details of the victims' stories and contrasted them with her client's own statements to Detective Cantu. (RP at 267-75).

Contrary to the defendant's argument, the record is clear that defense counsel's performance was not deficient. The decisions made during the pendency of the trial and the arguments at closing show that defense counsel made a series of tactical decisions in order to benefit her client. (RP at 271-74). As a result, based on a consideration of all the circumstances, the defendant failed to show that defense counsel's performance was deficient, or that it prejudiced him in any way. Defense counsel's actions clearly fall within an at least conceivably legitimate trial strategy.

IV. CONCLUSION

Based on the forgoing, the State respectfully asks this Court to affirm the imposition of LFOs and HIV testing, remand the no-contact order so that it can be modified to ten years, and remand for a new trial the defendant's conviction for Count 2 only, Communication with a Minor for Immoral Purposes. The State likewise asks this Court to find that the defendant's trial counsel provided effective assistance of counsel.

RESPECTFULLY SUBMITTED this 3rd day of February, 2014.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

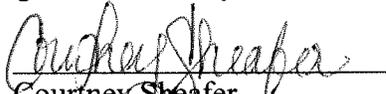
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