

FILED
APRIL 20, 2015
Court of Appeals
Division III
State of Washington

NO. 31965-2-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

ANAUM DIAZ GUZMAN,

APPELLANT.

BRIEF OF RESPONDENT

**GARTH L. DANO
PROSECUTING ATTORNEY**

**By: Carole L. Highland, WSBA #20504
Deputy Prosecuting Attorney
Attorney for Respondent**

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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 jury instructions accurately informed the jury that the charged crimes required unanimity for two separate and distinct acts.
2. Whether the admission of a discussion that the parents of the victim had had with her sister regarding the general topic of molestation was admissible.
3. Whether Appellant received ineffective assistance of counsel.

IV. STATEMENT OF THE CASE

The Appellant, Anaum Guzman, was charged with two counts of Rape of a Child involving his wife's adopted sister, R.T. Count one, as Rape of a Child in the First Degree occurring between July 26, 2001 and July 25, 2005 at a time when R.T. was less than twelve years only, not married to the Appellant, and at

least twenty four months younger than the Appellant and count two, as Rape of a Child in the Second Degree occurring between July 26, 2005 and July 25 2007 at a time when R.T. was at least twelve years old but less than fourteen years old, not married to the Appellant, and at least thirty six months younger than the Appellant. CP 90, 91.

Pre-trial the court, discussing the orientation of the jury, clarified that count one and two related to the same alleged victim, “that count one is alleged to have occurred in the four-year period from late July of '01 to late July of '05, and count two is alleged to have occurred in the two-year period from late July '05 to late July of '07.” RP 2, 3. After pre-trial discussions, the court indicated that *voir dire* and orientation of the jury would occur at 10:00. RP 39. While not transcribed, that process would include the reading of the information (CP 90, 91) as reflected *supra*.¹

V. ARGUMENT

A. APPELLANT'S CLAIM THAT THE JURY INSTRUCTIONS WERE INADEQUATE AND THUS MISLEADING, IS NOT WELL TAKEN WHEN THE JURY INSTRUCTIONS ARE CONSIDERED IN THEIR ENTIRETY.

¹ Those specific facts necessary to address Appellant's additional claims of error are contained within those specific sections. *Infra*.

Mr. Guzman maintains that the trial court's directives regarding the unanimity jury instruction for each of the two rape of a child charges could have confused or misled the jury. He alleges that the jury instructions as given allowed the jury to find the Appellant guilty of both counts on a unanimous finding based upon only one act. In support of his argument, Appellant correctly cites jury instructions no. 7, the so-called "*Petrich*" instruction, but fails to mention jury instructions nos. 3, 4, 5, & 6 which provided the jury with the specifics of each of the two allegations. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

Instruction No. 3 (first paragraph only) Charges and Burden of Proof: The Appellant is charged with rape of a child in the first degree in Count 1, and with rape of a child in the second degree in Count 2. You must decide each charge separately, as if it were a separate trial. Your verdict on one count should not control your verdict on the other count. RP 305. (emphasis added).

Instruction No. 4 Rape of a Child: A person commits the crime of rape of a child when he or she has sexual intercourse with a person deemed at law to be too young to consent, and not married to the accused. The age of the younger person and the difference in the parties' ages determines different degrees of rape of a child. When the younger person is less than 12 years old, and the older person is at least twenty-four months older, the crime occurs in the first degree. When the younger person is at least twelve and less than 14 years old, and the older person is at

least 36 months older, the crime occurs in the second degree.

As used in these instructions, the term "sexual intercourse" has its ordinary meaning, that is, that the sexual organ of the male entered and penetrated the sexual organ of the female. It occurs upon any penetration, however slight. The term also means any penetration, however slight, of the vagina or anus by an object or body part, committed by one person – committed on one person by another. The term also includes any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another. RP 306, 307.

Instruction No. 5 Count 1, Rape of a Child in the First Degree: To convict the Appellant of rape of a child in the first degree, as charged, the state must prove each of the following elements of the crime beyond a reasonable doubt: One, that on or between July 26, 2001 and July 25, 2005, the Appellant had sexual intercourse with R.T.; Two, that R.T. was at the time of such intercourse less than twelve years old and not married to the Appellant; Three, that R.T. is at least twenty-four months younger than the Appellant; and Four, that the 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 as to Count 1. On the other hand, if 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 as to count 1. RP 307, 308.

Instruction No. 6 Count 2, Rape of a Child in the Second Degree: To convict the Appellant of rape of a child in the second degree, as charged in count 2, the state must prove each of the following elements of the crime beyond a reasonable doubt: One, that on or between July 26, 2005

and July 25, 2007, the Appellant had sexual intercourse with R.T.; Two, that R.T. was at least twelve years old but less than fourteen years old at the time of the sexual intercourse and was not married to the Appellant; Three, that R.T. is at least thirty-six months younger than the Appellant; and Four, that the 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 as to Count 2. On the other hand, if 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 as to count 2. RP 308-309.

Instruction No. 7 Jury Unanimity: The state alleges that, on more than one occasion, the Appellant committed acts which could be found by the jury to constitute an element of a crime charged.

To convict the Appellant of rape of a child in the first degree, as charged in Count 1, at least one particular act of sexual intercourse 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 all the alleged acts have been proved.

To convict the Appellant of rape of a child in the second degree, as charged in Count 2, at least one particular act of sexual intercourse 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 all the alleged acts have been proved. RP 309-310.

In reviewing jury instructions, an appellate court is to be guided by the principle that “[j]ury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and when taken as a whole, properly inform the jury of the

law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995), *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999), *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990), *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014).

Additionally both counsel were careful to inform the jury not only in opening, but in closing as well, that the Appellant was charged with two separate crimes. RP 59, 69, 312, 334, 335, 339. The jury was given a *Petrich* instruction for each crime as well as specifically told that their verdict on one count should not control their verdict on the other.

When read as a whole and in context, it is clear that the contested jury instructions in Mr. Guzman’s case properly stated the applicable law and were not confusing or misleading. A jury is presumed to follow the court’s instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Mr. Guzman’s assertion about the inadequacy of the jury instructions is not supported by the record.

B. THE TESTIMONY OF THE CONVERSATION THAT THE THIRYS HAD WITH THEIR OTHER DAUGHTER WAS NOT HEARSAY, AS IT WAS NOT BEING OFFERED FOR THE TRUTH OF THE MATTER ASSERTED, BUT RATHER WAS ADMISSIBLE AS RELEVANT EVIDENCE.

Both Nick and Janice Thiry, the adoptive parents of both Deepa and her sister R.T., testified regarding a discussion which they had had with Deepa just days before they learned of R.T.'s allegations involving the Appellant. RP 114, 81-82.

As related by Nick Thiry, Deepa had come to him and his wife, and asked them what they would do if someone they knew was being abused. RP 114. In direct response to their inquiry whether or not she was speaking of someone specific, Ms. Deepa Thiry replied that she was speaking generally, having seen a video. RP 114, 81-82.

A day or two after this conversation, but a few days prior to the disclosure of R.T. regarding sexual abuse by the Appellant, Mr. Thiry and Mr. Guzman were on their way to lunch when Mr. Thiry made a comment to the effect that it was hard being a parent and related to Mr. Guzman the subject matter of what Ms. Deepa Thiry had discussed with them. RP 116.

According to Mr. Thiry, at that point, the Appellant became quiet, and at the restaurant acted uncharacteristically, eating little of his food. RP 116, 117.

The statement of Deepa to her parents was not hearsay as it was not being offered to prove the truth of the matter asserted, that

is, that Deepa had seen a video on abuse or molestation. Additionally, the statement by Mr. Thiry contains no allegations of actual sexual abuse much less, any allegations of actual sexual abuse by Mr. Guzman. As far as Mr. Thiry knew, Ms. Deepa Thiry had been talking about the general topic of sexual abuse having identified neither an alleged victim nor an alleged perpetrator. Certainly Mr. Thiry had no idea why his daughter had approached him and his wife as evidenced by his own statements to, and demeanor towards, Mr. Guzman, *e.g.*, Mr. Thiry didn't voice any apprehensions or concerns as to whether either of his daughters had been a victim of sexual abuse, nor did he become accusatory or hostile towards Mr. Guzman. RP 114, 116, 118. In fact, Mr. Thiry testified that when his son-in-law became quiet, Mr. Thiry was concerned that by accepting Mr. Guzman's offer to pay for the meal, he had placed a strain on the Appellant's budget. RP 118. Thus at the time that Mr. Thiry referenced his and his wife's conversation with Deepa, for all he knew the conversation was based on a general concern regarding the subject matter.

Ms. Janice Thiry, the adoptive mother of Deepa and R.T. testified about the same conversation with Deepa as follows:

Question by the prosecutor: Did your daughter Deepa come to speak to you and your husband after Christmas of 2010?

Answer by Janice Thiry: Yes.

Question: Okay. Do you know when she came to speak to you?

Answer: I'm thinking it was that next night, but it might have been the week night after that. Anyway, it was within a night or two after that Christmas Day we had together.

Question: And what did she want to talk to you about?

Mr. White (counsel for the defense): I'll object to that answer as involving hearsay.

Court: The objection is overruled.

Answer: She wanted to talk about molestation. She said that she watched a video—

Mr. White: I'll object to hearsay within that answer.

Court: The objection is sustained. Let's proceed on a question-by-question basis.

Prosecutor: Okay.

Court: Rather than narrative.

Prosecutor: Okay.

Question: Did she – what was her concern about molestation?

Answer: She wondered if it should be reported.

Question: And what did you tell her?

Answer: We told her yes, every time.

Question: Did she speak of any specific incident of molestation?

Answer: No.

RP 81, 82.

Appellant further argues that the testimony regarding this conversation was hearsay as it was offered to show Deepa's allegations involving him. However, there was no allegation or reference that Ms. Deepa Thiry also identified Mr. Guzman as having behaved sexually inappropriately towards herself. Appellant can only speculate that the jury believed that any reaction that Mr. Guzman had regarding the subject of sexual abuse had to do with a victim not before the court, and could have argued that Mr. Guzman's reaction was the result of something other than his possible consciousness of guilt regarding R.T. In fact, Mr. Guzman denied having exhibited the reaction the Mr. Thiry described, testifying that Deepa's conversation with her parents had caused him little concern and that his appetite had been normal. RP 274, 290.

There was nothing in the testimony of either parent that cast aspersions on the Appellant based upon Deepa Thiry's

conversation with them. The testimony of the Thirys would have been the same if, in fact, she had been coming to them to speak about a video that she had seen. It was perfectly permissible to argue the Appellant's post-responsive behavior to Mr. Thiry's statements regarding Deepa's conversation with him and his wife in light of R.T.'s subsequent disclosures.

As there was no indication that the conversation that Mr. Thiry related to Mr. Guzman referenced specific molestation of either girl, Appellant cannot argue that his counsel was ineffective for not objecting to it as hearsay. It was not offered to show that either of the girls had actually been molested by the Appellant, which would have been inadmissible hearsay, but rather was offered to show Appellant's consciousness of guilt and expression of such when the general topic was raised. Any resultant ER 403 unfair prejudice was outweighed by ER 401 relevance. Both R.T. and Mr. Guzman testified at length about the alleged acts of molestation and rape, and Mr. Guzman denied having responded to Mr. Thiry's general statement about Deepa Thiry's concerns as testified to by Mr. Thiry.

C. ANY POSSIBLE VIOLATION OF THE MOTION *IN LIMINE* REGARDING ALLEGATIONS INVOLVING DEEPA WAS *DE MINIMIS* AT MOST AND COULD NOT HAVE CAUSED PREJUDICE TOWARD THE APPELLANT.

Contrary to Appellant's assertion, Janice Thiry's testimony regarding the disclosures of R.T. to her, in the presence of Deepa, do not clearly indicate that Deepa was had also been a victim of the Appellant's behavior. The fact that "they" had something to tell them, doesn't necessarily go beyond the scope of the abuse of R.T. RP 85, 86. However, Ms. Thiry further stated that "I started reassuring them that they – that there was hope, that we – that they weren't bad girls, that – that they were worth – that they were worthy. RP 86. Although this last statement is arguably somewhat problematic, it existed in isolation and was neither highlighted nor expounded upon. There was no objection made which avoided any attention being brought to the testimony and any possible speculation about it. It's just as possible that Ms. Thiry's statement could be interpreted in the context of her reassuring her daughters that bringing R.T.'s allegations to light did not make them bad girls. As there was no further reference to this statement, the State would argue that any potential prejudice can only be speculative and was *de minimis* at most.

D. TRIAL COUNSEL WAS NOT INEFFECTIVE AS HE VIGOROUSLY AND ZEALOUSLY REPRESENTED HIS CLIENT.

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), courts apply a two-pronged test in assessing ineffective assistance of counsel claims. Courts are to ask 1) whether counsel's performance failed to meet a standard of reasonableness, and 2) whether actual prejudice resulted from counsel's failures. 466 U.S. at 690-2. An appellant must satisfy both prongs of the ineffective assistance of counsel test. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed. 2d 482 (2006). If one prong of the test fails, the court need not address the remaining prong. *Hendrickson*, 129 Wn.2d at 78.

To establish deficient performance of counsel, Mr. Guzman must show that after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness, and that that deficient representation prejudiced him, *i.e.*, a reasonable probability exists the outcome would have been different without the deficient representation. Courts presume

counsel's representation was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Appellant argues that counsel in his second trial did not produce the impeachment witnesses that his first trial counsel had and as such provided ineffective assistance of counsel. Appellant specifically points to those differences in R.T.'s testimony compared to what she had told the investigating officers. However Appellant's assertion belies the fact that his second trial counsel did seek to impeach the complaining witness's testimony by directly cross examining R.T. about these discrepancies, e.g., that R.T. had told Officer Buescher that Mr. Guzman had touched her over her clothes between the ages of 8 and 14 (RP 204); that R.T. had told Sergeant Detective Dan Bohnet in response to his questioning that Mr. Guzman had not threatened her (RP 213, 216); that R.T. had told Sergeant Detective Dan Bohnet that Mr. Guzman had not been able to put his penis in her vagina (RP 239-241).

The State would argue that directly confronting the complaining witness about the discrepancies between her interviews with law enforcement and her subsequent trial testimony is much more powerful than turning the contradictions into what would appear to be a "she says, he says she said" contest.

Furthermore the same transcripts of the officers' interviews which allowed for rehabilitation of the victim had been available and utilized at Appellant's first trial.

Counsel at Appellant's second trial also vigorously and extensively cross-examined R.T. about her failure to seek counseling at school despite its availability and the fact that she was well liked, RP 185-188, 198; her possible jealousy towards the Appellant as the motive for her allegations, RP 200; the contradictions between her statements to law enforcement and those at trial; the fact that R.T. had shared a bedroom with Deepa during many of the years that the abuse had been occurring and had never told her about it, RP 190-192; the fact that R.T. had had a good relationship with her parents during many of the years that the abuse had been occurring and had never told them about it, RP 199; the fact that there was often someone else nearby or present during the incidents of abuse who was unaware of the abuse occurring, 204-206, *passim*; the fact that R.T. continued to go fishing with the Appellant despite the fact that more than one of the acts of alleged rape had occurred during these fishing trips, RP 205, 206, 233; the fact that R.T. continued to go to the Appellant and her sister's home and never told her parents that she didn't

want to go, RP 210; the fact that according to R.T., many of the acts of abuse that had occurred at the home of the Appellant stopped when footsteps were heard, yet no one ever appeared, RP 218, *passim*.

Contrary to Appellant's assertion, his counsel at trial was exceedingly zealous on his behalf. In fact, a review of the two transcripts shows that Mr. Guzman's counsel in his second trial cross-examined R.T. for more than twice as long as his counsel in his first trial had.

Counsel also elicited from every witness that there was usually someone else nearby and/or present during the alleged acts of rape and molestation. R.T. herself testified that she never went fishing alone with the Appellant, and while she wasn't molested every time they went fishing, her brother, Sharad, had been present during at least two incidents and had been unaware that anything was occurring. RP 205, 168-170.

VI. CONCLUSION

Appellant cannot show that the jury instructions as a whole were misleading; that the admission of the conversation between Deepa and her parents was inadmissible; or that his counsel's performance failed to meet a standard of reasonableness.

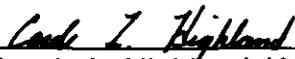
Furthermore, Appellant cannot show a reasonable probability exists that the outcome would have been different, arguing only speculation and *ipse dixit*. No trial is without error, but even under a theory of cumulative error, Appellant fails to make even a threshold showing.

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

DATED this 20th day of April, 2015.

Respectfully submitted:

Garth L. Dano, WSBA #11226
Grant County Prosecuting Attorney



Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent.)	No. 31965-2-III
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v.)	
)	
ANAUM DIAZ GUZMAN,)	DECLARATION OF SERVICE
)	
Appellant)	
_____)	

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

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and his attorney, containing a copy of the Brief of Respondent in the above-entitled matter.

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Dated: April 20, 2015.



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