

COA No. 33721-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY BIGGS,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Zachary Biggs received ineffective assistance of counsel, who failed to raise the defense of diminished capacity.

2. The court erred by determining the two counts of first degree rape were not the same criminal conduct and thus imposing consecutive sentences.

3. The court erred by failing to address the *Blazina* factors before imposing discretionary LFOs.

Issues Pertaining to Assignments of Error

A. Did Mr. Biggs receive ineffective assistance when his counsel failed to raise the defense of diminished capacity? (Assignment of Error 1).

B. Did the court err by determining the two counts of first degree rape were not the same criminal conduct? (Assignment of Error 2).

C. Did the court err by imposing consecutive sentences for the two counts of first degree rape? (Assignment of Error 2).

D. Did the court err by imposing discretionary LFOs without addressing the *Blazina* factors? (Assignment of Error 3).

II. STATEMENT OF THE CASE

Mr. Biggs was charged by third amended information in

counts 1 and 2 of first degree rape with domestic violence and deadly weapon special allegations and in count 3 with felony violation of a domestic violence court order with domestic violence and deadly weapon special allegations. (CP 132). He had pleaded guilty to a single count of second degree rape pursuant to a plea bargain, but he was later allowed to withdraw his guilty plea. (CP 85-86, 90-100, 119-23, 124-25, 128). The court had previously ordered a competency examination for Mr. Biggs at Eastern State Hospital. (CP 45-49). He was found competent to stand trial. (CP 58-66, 67-68). Mr. Biggs waived his right to a jury trial. (CP 80).

After a bench trial, the court entered these findings of fact:

1. On December 10, 2013, the Defendant ZACHARY J. BIGGS, and Stacey Biggs, were married with two children in common, but separated and Stacey had filed for divorce in the State of Idaho. At that time there was a valid foreign Domestic Violence Order, issued by the District Court of Idaho for the Second Judicial District under the case Stacey Lynne Biggs v. Zachary Joseph Biggs, Cause No. CV13-02153, which precluded the Defendant from having any contact with Stacey Biggs. The Defendant was, at that time, residing at the home of his mother, Cheryl Biggs, which was located at 1470 Elm Street, Clarkston, Asotin County, Washington.
2. On December 10, 2013, Stacey Biggs went to the Defendant's residence to bring him a box of food. She approached the residence at the back door. The Defendant opened the door and she entered, at which time he grabbed her, pushed to the floor, got on top of her and began asking

her why she was there and accusing her of being someone else.

3. The Defendant either let her up or stood her up and then pushed her into his bedroom and locked the door. He pushed her onto the bed, retrieved a machete, threatened her with it and began accusing her of wearing a mask, and being an imposter and having been involved in raping him in the past. The machete was approximately two feet long, all black with an eighteen inch blade that had a serrated back bone.

4. The Defendant believed that he and Stacey Biggs had been drugged at a community concert event and that they were then raped a few years earlier. This event did not happen according to Stacey, but the Defendant continued to believe that it did and claimed to be looking for the people who did this.

5. At some point during the attack, the Defendant told Stacey that she was going to have sex with him for the purposes of proving who she was. He began forcing her to perform fellatio on him, penetrating her mouth with his penis, causing her to gag. Stacey acceded to his demands out of fear due to his threats and use of the machete.

6. The Defendant then demanded vaginal intercourse and pushed her to the floor where, out of fear, she again acceded to his command. While on the floor, the Defendant decided that she was not participating to his satisfaction, he began accusing her of being an imposter and threatened her with the machete. Stacey begged him and told him that it was just because her back hurt from a previous car accident injury and asked to move to the bed. The Defendant then moved her to the bed and again engaged in vaginal intercourse with her. Stacey feared for her life and continued to accede to him.

7. At various times during the attack he held the machete to her neck and threatened to kill her. He also had retrieved a sharpening stone and threatened to bash her in the head with it.

8. Stacey Biggs did not believe that the Defendant was going to let her go and that she would be killed by him that night. During the attack the Defendant threatened her and told her she would not see her kids again, that he would dismember her and sell her parts. Her cooperation with him was merely in hopes of calming him and placating him so that she might be allowed to leave.

9. At no point was the intercourse consensual as any consent was obtained by coercive threat of injury or death. During the course of conduct, the Defendant continually displayed the machete and menaced her with it throughout.

10. After threatening to kill her if she told anyone or reported this incident to the police, the Defendant demanded that she drive him to the store and buy him a cigar. She did so due to fear of the Defendant. She then dropped him off at the residence and he retrieved the box of food from the vehicle. He then allowed her to leave.

11. Stacey Biggs went home to the residence of her mother, Linda Fuhrman, with whom she was staying during the separation. Ms. Fuhrman observed her to be upset and confronted Stacey about this. Stacey then reported to her mother what had occurred at the Defendant's residence. Ms. Fuhrman observed Stacey to be more distraught than she had ever seen her. Stacey did not want to call the police.

12. Stacey went to work at a medical clinic in nearby Lapwai, Idaho, the next morning and co-workers there observed her to be upset and asked her about

this. Melissa Berry observed injuries including red “poke” marks on her neck. Stacey’s supervisor called the local Nez Perce Tribal Police and the investigation was eventually forwarded to the Asotin County Sheriff’s Office.

13. Asotin County Detective Jackie Nichols interviewed Stacey Biggs on December 19, 2013 and served a search warrant on December 20, 2013 for the residence at 1470 Elm Street, Clarkston, Washington. At that time, photos were taken and the machete (P-2) and sharpening stone (P-3) were recovered, as well as a copy of the protection order (P-1) which was located under the seat cushion of a chair in the Defendant’s bedroom.

14. On December 12, 2013, the Defendant was arrested on other charges involving an assault on his brother, Seth Biggs. On December 12, 2013, the Defendant requested contact with Deputy Jeffrey Polillo claiming to have information concerning terrorism. The Defendant spoke of silicon gel masks and claimed to have seen someone who was wearing one that looked like him. He claimed that on two occasions, a mold of his face had been made while he was drugged. He further claimed that he had been sodomized during these incidents. He stated that he had seen a video on a cell phone belonging to another person, this video showed Stacey entering the back door of his mother’s residence and being grabbed by a person in a black coat. The Defendant then abruptly questioned how he could rape Stacey when it was consensual. Deputy Polillo was unaware of the rape investigation at that time.

15. While in the jail in these matters, the Defendant wrote a multitude of letters to Linda Fuhrman and others, eight of which were admitted into evidence. In his letters he initially posited that his brother Seth Biggs may have been the perpetrator of the rape and asked Ms. Fuhrman to “push Stacey to remember.”

In later letters he asked that Stacey not come to trial and testify. A subsequent letter sent to Gene Grende, a person with known history of violence, instructed him to contact Stacey and stated that, [N]ow would the time to have people run into her or talk to her” as trial was impending. These letters all demonstrate guilty knowledge.

16. The Court specifically finds that the testimony of Detective Jackie Nichols was wholly credible with regard to her testimony in this matter.

17. Based upon the corroborating evidence, the Court finds that the testimony of Stacey Biggs was substantively credible in this matter.

18. The Court does not find credible the testimony from the Defendant’s witnesses Athena Biggs, Darcy Brown, Christopher Perini concerning alleged prior inconsistent statements of Stacey Biggs wherein she allegedly stated that she didn’t believe she was raped by the Defendant. The memories appear to the Court to be faded by time or eroded by emotional bias toward the Defendant.

19. The machete was a knife with a blade length in excess of three inches and was used or offered to be used in a manner rendering it capable of causing death or substantial bodily harm.

20. At all times relevant hereto, the machete was readily available for offensive or defensive purposes and there was clearly a nexus to the criminal acts described above as it was used to intimidate the victim during the rapes and protection order violations. (CP 183-85).

The court stated the facts were found beyond a reasonable doubt. (CP 182). From those facts, the court made these conclusions of law:

BASED UPON the foregoing FINDINGS OF FACT the Court concludes that as a matter of law, ZACHARY J. BIGGS is guilty of Rape in the First Degree as charged in Count 1 and specifically finds that, beyond a reasonable doubt, on December 10, 2013, in Asotin County, Washington, the Defendant engaged in sexual intercourse, to wit: penile penetration of her mouth, with Stacey Biggs, by forcible compulsion, and that in so doing, used or threatened the use of a deadly weapon or what appeared to be a deadly weapon, and further, that the Defendant was armed with a deadly weapon during commission of the crime.

The Court further finds that, as a matter of law, ZACHARY J. BIGGS is guilty of Rape in the First Degree as charged in Count 2 and specifically finds that, beyond a reasonable doubt, on December 10, 2013, in Asotin County, Washington, the Defendant engaged in sexual intercourse, to wit: penile penetration of her vagina, with Stacey Biggs, by forcible compulsion, and that in so doing, used or threatened the use of a deadly weapon or what appeared to be a deadly weapon, and further, that the Defendant was armed with a deadly weapon during the commission of the crime.

The Court further finds that, as a matter of law, ZACHARY J. BIGGS is guilty of Violation of a Domestic Violence Court Order Violation as charged in Count 3 and specifically finds that, beyond a reasonable doubt, on December 10, 2013, there was in effect a protection order, restraining order, no-contact order, or foreign protection order applicable to the Defendant,

that the Defendant knew of the order and its terms, that the Defendant knowing violated the terms of this order, by assaulting Stacey Biggs, and this act occurred in Asotin County, Washington; and further, that the Defendant was armed with a deadly weapon during commission of the crime.

The Court concludes that, for the purposes of all crimes charged herein, that the Defendant and the victim were members of the same family or household as defined in RCW 10.99.020. (CP 186-87).

At sentencing, the court found two prior convictions out of Idaho were one offense for purposes of determining the offender score. (CP 221). The defense argued also that the first degree rapes were the same criminal conduct under RCW 9.94A.589(1)(a). The court disagreed and sentenced Mr. Biggs to consecutive sentences on the rape convictions plus enhancements. It imposed 186 months (including a 24-month deadly weapon enhancement) for count 1: first degree rape DV, 117 months (including a 24-month deadly weapon enhancement) for count 2: first degree rape DV, running consecutively for a minimum of 303 months on those convictions with a maximum term of life. (CP 223). The court imposed 54 months for violation of a protection order DV, running concurrently with the rape sentences but with the 6-month deadly weapon enhancement running consecutively to the other

sentences. (*Id.*). The total confinement was thus 309 months to life. (*Id.*). This appeal follows.

III. ARGUMENT

A. Mr. Biggs received ineffective assistance when counsel failed to raise the defense of diminished capacity.

To prove ineffective assistance, Mr. Biggs must show (1) counsel's representation fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To establish the prejudice prong, he must show there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reasonable probability is one sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Mr. Biggs must show the absence of a legitimate tactical or strategic reason for the challenged conduct, *i.e.*, the failure to pursue a diminished capacity defense. *State v. McNeal*, 145

Wn.2d 352, 362, 37 P.3d 280 (2002). Here, there is no justifiable tactical or strategic reason whatsoever for counsel's failure to raise the defense. As reflected in the trial testimony and the court's findings of fact, the record contains more than sufficient evidence of Mr. Biggs' inability to distinguish between what he thought and what happened. There was already an issue as to Mr. Biggs' competency to stand trial. (CP 45-49). He was found competent. (CP 58-66, 67-68). His counsel did not raise an insanity defense. But competency to stand trial, an insanity defense, and a diminished capacity defense are not the same.

Diminished capacity, rather akin to an affirmative defense, is an argument that a specific element of the offenses, intent or *mens rea*, has not been proved beyond a reasonable doubt. *State v. Gough*, 53 Wn. App. 619, 622, 768 P.2d 1028, *review denied*, 112 Wn.2d 1026 (1989). To show diminished capacity, "a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Although rape requires no specific intent, there still must be an

culpable mental state to make Mr. Briggs' actions a crime. See *State v. Walden*, 69 Wn. App. 183, 847 P.2d 956 (1993).

The record shows counsel chose not to present an insanity defense and relied on general denial. (CP 72-73, 129). With the first degree rape charges carrying a minimum term and a maximum of life, Mr. Biggs was owed every defense available to him. Diminished capacity should have been one. Clearly, counsel was aware of his client's mental health issues and noted them in his sentencing memorandum:

Throughout the sexual assault, Mr. Biggs pulled at Mrs. Biggs' face, claiming that she was wearing a gel mask. He made numerous references to an incident in their past when he claimed that he and Mrs. Biggs had been raped. Following Mr. Biggs' arrest three days later, he contacted an Asotin County officer, Deputy Polillo, and informed him that he was convinced people in the community were wearing gel masks. He also claimed that he had been raped on at least two occasions, and that someone had stuck twizzlers up his rectum on one occasion, and a squirt gun on another. Mr. Biggs also wrote dozens of letters from the Asotin County jail during the 18 months he was awaiting trial, during which he repeatedly referenced these allegations.

Throughout the trial significant amounts of testimony were devoted to the discussion of Mr. Biggs' mental state. A substantial amount of evidence was put forward suggesting that Mr. Biggs was not fully in his right mind at the time of the offense, and that he had frequently said or done things in the months

leading up to this event that gave his friends and family concerns about his mental health. The Court made note of this in its findings of fact, and expressed frustration that neither the State nor Defense had proffered an explanation as to why Mr. Biggs would be in such an unstable state. (CP 158-59).

Counsel's own memorandum acknowledges he was fully aware that there was a substantial amount of evidence "suggesting that Mr. Biggs was not fully in his right mind at the time of the offense." (CP 159). That is the essence of a diminished capacity defense. Mr. Biggs was not insane, but his mental health issues at the time of the offense certainly put his diminished capacity at issue and counsel knew it.

At sentencing, the court recognized something was amiss with Mr. Biggs' mental condition:

Based on the sentencing range that's available to me, 309 is the low end of the determinate portion of the sentence. Life is the higher end. I believe that the 309 is appropriate in your case, because of questions that I have relative to your mental state at the time that this was committed. Some of the things that were – unrefuted in the testimony was just troubling. And I don't know why things came about like they did. I don't know if you have some organic deficiency. That wasn't presented to me. I don't know if you had drug-related problems. That wasn't presented to me. I don't know. I just know that the testimony that I heard was troubling. And the picture that was presented was troubling. (8/20/15 RP 481).

Both counsel and the court knew Mr. Biggs' mental health issues were an issue and a possible defense. He was competent to stand trial and was not insane, but he had the middle-ground defense of diminished capacity. To provide reasonable representation, counsel was obligated to retain an expert showing his client had "a mental disorder, not amounting to insanity, [that] impaired his ability to form the culpable mental state to commit the crime charged." *Atsbeha*, 142 Wn.2d at 914. He did not. In these circumstances, counsel had no legitimate tactical or strategic reason for not presenting the defense. Indeed, the court itself was troubled by it. This fell below the objective standard of reasonableness and was ineffective assistance. *Stenson*, 132 Wn.2d at 705. A new trial is warranted.

B. The court erred by determining the two counts of first degree rape were not the same criminal conduct and thus imposing consecutive sentences.

Mr. Biggs contended the two first degree rapes were the same criminal conduct under RCW 9.94A. 589, *i.e.*, two or more crimes that require the same criminal intent, committed at the same time and place, and involve the same victim. The facts plainly show the rapes were at the same time and place

and involved the same victim. The same criminal conduct analysis applies to “serious violent offenses” as consecutive sentences are required when the offenses arise “from separate and distinct criminal conduct.” RCW 9.94A.589(1)(b). The issue is whether there was the same criminal intent.

To make that determination, the court must decide whether the defendant’s criminal intent, viewed objectively, changed from one crime to the next. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). The standard focuses on whether the defendant’s objective intent remained the same for multiple offenses. *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237, 749 P.2d 160 (1988). Intent does not mean a particular mens rea element of a crime, but rather means the offender’s objective purpose in committing the crimes. *In re Pers. Restraint of Holmes*, 69 Wn. App. 282, 290, 848 P.2d 754 (1993), *overruled on other grounds by State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). The inquiry rests on whether one crime furthered another. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999), is instructive. The defendant broke into the victim’s room and

penetrated her in the anus and vagina with his finger separately and not simultaneously. He then penetrated her vagina with his penis. The question was whether the defendant had formed separate intents in committing the crimes. Distinguishing the facts in *Grantham, supra*, the court determined Tili did not have the opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. 139 Wn.2d at 123-24.

Mr. Biggs' objective intent in committing the rapes did not change from one to another and each crime did in fact further another. *Tili*, 139 W.2d at 123-24; *In re Pers. Restraint of Holmes*, 69 Wn. App. at 290. After the oral sex, he proceeded to have vaginal intercourse with Ms. Biggs and only when she said her back hurt was when they went from the floor to the bed. But nothing else changed. This was a continuous offense that was ongoing in short succession. *Walden*, 69 Wn. App. at 184-85. The sole objective intent was to have sex with Ms. Biggs – how they had sex had nothing to do with that intent, which stayed the same. He neither had the time to pause and reflect for his intent to change nor the opportunity to cease the criminal activity. See

Grantham, 84 Wn. App. at 856-57. By misapplying the law, the court abused its discretion by not finding the two rapes were the same criminal conduct and thus imposing consecutive sentences. *Tili*, 139 Wn.2d at 122.

C. The court erred by failing to address the *Blazina* factors before imposing discretionary LFOs.

The court imposed \$4280 in LFOs, consisting of \$500 victim assessment, \$1830 service fees and filing fee, \$750 for court-appointed attorney, \$1000 fine, \$100 DV assessment, and \$100 felony DNA collection fee. (CP 221). As to the mandatory fees, no *Blazina* inquiry is necessary. *State v. Clark*, 195 Wn. App. 868, 871-72, 381 P.3d 198 (2016); *State v. Duncan*, 185 Wn.2d 430, 437 n.1, 374 P.3d 83 (2016). But as for the discretionary LFOs imposed, the court made no inquiry whatsoever as to Mr. Biggs' current and future ability to pay or any of the other factors required by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). (8/20/15 RP 482). The remedy is remand for a new sentencing for consideration of these factors as to his ability to pay the discretionary LFOs.

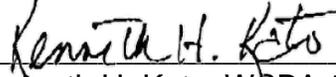
IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Biggs

respectfully urges this Court to reverse his convictions and remand for new trial or, in the alternative, remand for resentencing.

DATED this 19th day of January, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 19, 2017, I served a copy of the Brief of Appellant by USPS on Zachary Biggs, # 361305, PO Box 769, Connell, WA 99326; and by email, as agreed, on Benjamin Nichols at lwebber@co.asotin.wa.us.

