

COA No. 33935-1-III

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Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE WILSON,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Dale Wilson received ineffective assistance of counsel when he did not challenge for cause juror 31, who disclosed on voir dire she was a victim of molestation as a child, could not say it would affect her decision or not, and her initial gut feeling about this child rape case was poor.

2. The State's evidence was insufficient to support the conviction.

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

Issues Pertaining to Assignments of Error

A. Did Mr. Wilson receive ineffective assistance of counsel when he did not challenge for cause juror 31, who disclosed on voir dire she was a victim of molestation as a child; she could not say it would affect her decision or not; her initial gut feeling about this child rape case was poor, and she was the presiding juror? (Assignment of Error 1).

B. Was the State's evidence insufficient to support the conviction beyond a reasonable doubt? (Assignment of Error 2).

C. Did the court err by failing to adequately address the *Blazina* factors before imposing LFOs? (Assignment of Error 3).

II. STATEMENT OF THE CASE

Mr. Wilson was charged with one count of first degree rape of a child. (CP 1, 200). He stipulated to the admissibility of child hearsay statements in exchange for the State's recommendation for a low-end standard range sentence of 93 months if convicted of the charge. (CP 180).

B.L. was born on October 7, 2005. (10/7/15 RP 15). After her mother passed away in 2009, she and her brother, Brian, lived with their aunt, Laurie Lund, in East Wenatchee. (*Id.* at 16-17, 61). Ms. Lund began dating Mr. Wilson in October 2012. (10/7/15 RP 64). Their relationship ended in late June 2014 after B.L. made disclosures about sexual contact with Mr. Wilson. (10/7/15 RP 65-66; 10/9/15 382-83). Although not recalling exactly when, B.L. remembered Mr. Wilson coming to their house. (10/7/15 RP 20-21). She testified he made her suck his penis more than once. (*Id.* at 23). Mr. Wilson told her when boys do that, they squirt. (*Id.*). B.L. said he squirted once in the bathroom, but could not remember when. (*Id.* at 24).

She told her cousin Tishelle, Aunt Julie, and Uncle Darren about it during a visit to their house in Odessa. (10/7/15 RP 26). B.L. had gone to a park with Tishelle and her brother, Brian. (*Id.*).

She told Tishelle what Dale did to her because she felt it was wrong and could not keep it a secret anymore. (*Id.* at 27). It happened when she was in the second or third grade. (*Id.*) Tishelle told her to tell Aunt Julie and Uncle Darren about it; she did. (*Id.* at 28). B.L. also told Ms. Lund and a detective what Mr. Wilson had done. (*Id.*) He talked about sex to her, mainly what boys did with girls with their penises. (*Id.* at 29). B.L. did not make up these things to get Mr. Wilson in trouble. (*Id.* at 29-30). She said he showed her videos with naked people in them. (*Id.* at 54-55).

Ms. Lund said B.L. was four and Brian seven when they came to live with her. (10/7/15 RP 62). After meeting in October 2012, Mr. Wilson would visit Ms. Lund in East Wenatchee about every other weekend. (*Id.* at 65-66). When he came over, there were times when he was alone with the children. (*Id.* at 68). Ms. Lund recalled working for Liberty Orchards when school started in 2013 and for three days having to be there at 6 a.m., so Mr. Wilson was there alone with B.L. and Brian. (*Id.*) She worked at Liberty Orchards from June to October 2013. (*Id.* at 146).

Mr. Wilson and Ms. Lund took a trip to Canada and left on June 4, 2014. (10/7/15 RP 69-70). They took the kids to Odessa to stay with her sister, Julie Bowers, and came back on June 21.

(*Id.*). On their return, her sister told Ms. Lund that B.L. disclosed there had been sexual contact between her and Mr. Wilson. (*Id.* at 75). Ms. Lund chose not to discuss the matter with everyone around and they left for East Wenatchee. (*Id.* at 77. She also did not talk about it between June 21 and 24, when Mr. Wilson left to go back home to Bellingham. (*Id.* at 77-78).

Probably the next morning, Ms. Lund talked to B.L. about what she told Aunt Julie. (10/7/15 RP 79). B.L. said Mr. Wilson was teaching her about sex, had put his penis in her mouth, and was showing her how men squirt. (*Id.* 80). He said if she told anyone, no one would believe her and she would get a spanking. (*Id.*). B.L. said Mr. Wilson did it when Ms. Lund was not around. (*Id.* at 80-81). He showed her videos of women sucking on men's penises. (*Id.* at 81).

A couple of days later, Ms. Lund called Mr. Wilson and confronted him. (10/7/15 RP 84). He was shocked and came up with reasons why B.L. could be saying those things. (*Id.*). Mr. Wilson said B.L.'s grandpa J.R. had been doing things to her and maybe someone spoke to her about it. (*Id.* at 87-88). J.R. lived in Tonasket, where B.L. used to live, but he last saw her in 2011. (*Id.* at 89). In June 2014, she was eight years old. (10/7/15 RP 92).

Mr. Wilson denied what B.L. said happened. (10/7/15 RP 94-95). Ms. Lund called the police on June 27, 2014. (*Id.* at 105). She had been a victim of attempted abuse by J.R. in the past. (*Id.* at 117). Ms. Lund also acknowledged B.L. sometimes fibbed. (*Id.* at 133-34). There was also an occasion when she found on Brian's phone pornography obtained from his friend, Seth. (*Id.* at 144; 10/8/15 RP 223).

Tishelle Bowers, Ms. Lund's niece, said Brian and B.L. were at their house in Odessa when B.L. brought up issues she had with Mr. Wilson. (10/8/15 RP 169-71). They were at the park when B.L. asked if Tishelle could keep a secret, whereupon she said Mr. Wilson had been teaching her about sex and a man would put his penis in the three main holes, pointing to her mouth, butt, and vagina. (*Id.* at 171-72). Speechless, Tishelle told her they needed to go home. She took B.L. into her mother's room and told her to tell Aunt Julie. (*Id.* at 174). B.L. told her the same story she told Tishelle. (*Id.* at 176). On June 20, Julie Bowers said tell me again and B.L. recounted the same story in the same order. (*Id.* at 177, 197-98). B.L. added, however, that a guy would squirt, but Mr. Wilson did not do it to her. (*Id.* at 178). All these incidents happened at the East Wenatchee apartment. (*Id.*).

Detective Darin Darnell investigated after becoming aware of the allegations on June 27, 2014, in a voicemail from Ms. Lund. (10/8/15 RP 252). He searched for DNA/semen evidence from the bathroom counter where Mr. Wilson allegedly ejaculated and for pornographic videos on the laptops of Ms. Lund and Mr. Wilson. (*Id.* at 254-256). The results for DNA/semen evidence were negative as were the results of the video search. (*Id.* at 255, 259).

The detective got information from Tishelle and Julie Bowers and interviewed B.L. (*Id.* at 260). B.L. was in the second grade and eight years old at the time of the interview. (*Id.* at 262, 292). Her story was consistent on the main points. (*Id.* at 260).

Mr. Wilson testified in his own defense. He learned of B.L.'s allegations on June 25, 2014. (10/9/15 RP 389). On May 17, 2014, B.L. told him J.R. had not smacked her on the side of the head like he did Brian, but he would make her do naughty things. (*Id.* at 395, 398). Mr. Wilson testified he did not molest B.L. or stick his penis in her mouth. (*Id.* at 411-12, 422).

No objections or exceptions were taken to the jury instructions. (10/9/15 RP 427). The jury convicted Mr. Wilson as charged. (*Id.* at 481; CP 220). The court sentenced him within the standard range to a minimum term of 93 months and a maximum of

life. (11/30/15 RP 501-02; CP 243). This appeal follows. (CP 253).

III. ARGUMENT

A. Mr. Wilson received ineffective assistance of counsel, who failed to challenge for cause juror 31, who was a victim of child molestation, did not know whether it would affect her decision or not, and acknowledged her initial gut feeling about this case was poor.

During voir dire, juror 31 disclosed she was molested as a child; she did not know if that would affect her decision; and she had a poor initial gut feeling about this child rape case. (10/7/15 Supp VRP 11, 65-68). Defense counsel inquired further and juror 31 then said, despite her prior disclosures, she could be fair and impartial. (*Id.* at 66). He did not inquire further and made no challenge for cause and juror 31 became the foreperson for a jury that convicted Mr. Wilson in one hour. (10/9/15 RP 481).

To prove ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A

lawyer's performance is deficient if he made errors so serious that he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986). But the defendant need not show that counsel's deficient performance more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693. Legitimate tactics or strategy will not support a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

There was sufficient disclosure by juror 31 to call into question her impartiality and lack of bias. Even though she seemingly changed heart and said she could be fair and impartial, counsel should have nonetheless made the challenge to make his record. CrR 6.4(c)(1); *State v Irby*, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015), *review denied*, 184 Wn.2d 1036 (2016). Counsel certainly should challenge jurors for cause when someone, like juror 31, has actual or implied bias. CrR 6.4(c); *State v. Slert*, 2016 Wash. LEXIS 1137 (Wash. Oct. 27, 2016). Yet, counsel did not challenge her for cause (10/7/15 Supp. VRP; CP 183-85, 187-88). Nor did he use a peremptory challenge on juror 31 even

though he did exercise all of them on other jurors. When that unchallenged juror then becomes the foreperson of a jury reaching a guilty verdict in one hour, it starkly shows a challenge for cause should have been made and there was no legitimate trial strategy or tactics for not making that challenge, which certainly should have done. *Slert, supra*. There can be no confidence in the verdict and a new trial is warranted.

B. The State's evidence was insufficient to support the conviction beyond a reasonable doubt.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or

conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

The defense did not dispute any elements of first degree child rape except whether Mr. Wilson committed the crime. (10/9/15 RP 463). As in many sexual offense cases, the only people who really know what happened are the victim and the perpetrator as there are no other witnesses. Resolution depends on whom the jury believes. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). But the existence of facts cannot be founded on guess, speculation, or conjecture and that is what happened here.

B.L. liked Mr. Wilson. (10/7/15 RP 30). She had revealed grandpa J.R. did naughty things to her just a month before disclosing what Mr. Wilson allegedly did. (10/9/15 RP 398). There was some evidence of a crime, but that evidence still fell short of proving Mr. Wilson committed first degree child rape beyond a reasonable doubt. *Green*, 94 Wn.2d at 220-21. To reach its verdict, the jury guessed and speculated Mr. Wilson was guilty of the crime. That is not evidence and the verdict cannot stand. *Hutton, supra*.

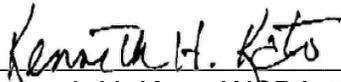
C. The court erred by failing to adequately address the *Blazina* factors before imposing LFOs.

The court imposed LFOs against Mr. Wilson. (11/30/15 RP 503). Except for noting he would be in prison for about seven years and would not be violated during that time for not paying the ordered \$25/month for LFOs when it would then be revisited on his release, the court made no individualized inquiry at all as to 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). The remedy is remand for consideration of these factors as to Mr. Wilson's ability to pay at a new sentencing hearing. *Id.* at 839.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Wilson Grant respectfully urges this Court to reverse his conviction and dismiss the charge or, alternatively, remand for further proceedings, including a new sentence hearing on *Blazina* factors.

DATED this 21st day of November, 2016.



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CERTIFICATE OF SERVICE

I certify that on November 21, 2016, I served a copy of the brief of appellant by USPS on Dale Wilson, # 386164, Monroe Corrections Center – TRU, PO Box 888, Monroe, WA 98272; and by email, as agreed, on Steve Clem at sclem@co.douglas.wa.us.

