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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	NO. 33935-1-III
)	
Respondent,)	
)	
v.)	
)	
DALE WILSON)	Douglas County Superior
)	Court No. 141001782
Appellant)	

BRIEF OF RESPONDENT

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A. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by Defendant.

B. STATEMENT OF THE CASE

1. Evidence supporting conviction.

Respondent is satisfied with the statement in appellant's brief pertaining to the facts and circumstances presented by the witnesses at trial. RAP 10.3(b).

2. Jury selection.

At the outset of voir dire the court asked the panel several general questions, the second being, "[h]ave you, a close friend or relative had experience with a similar or related type of case or incident?" (10/7/15 Supp VRP 10). If jurors raised their card, the follow up question from the judge was "[w]ould that affect your ability to be fair and impartial?" Id. Several panel members raised their cards. The first two jurors gave equivocal answers and were informed by the judge that the attorneys would inquire further.

Juror 31, the third to be addressed by the judge, stated she “was molested as a child – and I would – I can’t say that it would affect my decision or, or not, but, so ...” (supra at 11).

The next juror, no. 33, indicated that as a victim of rape who suffers from PTSD, he would not be fair and impartial. Defense counsel openly and immediately moved to excuse 33 for cause; the court excused 33. (supra 11 -12).

Later on during voir dire defense counsel revisited Juror 31, and after noting “all these issues” and reminding her that she had shared her own experience, asked if she could be fair and impartial.” Juror 31 answered “I believe I can be fair and impartial.” Defense counsel continued his discussion with Juror 31 at length before moving on to other jurors, gaining from her a concession that first “perception isn’t always accurate.” (supra 65-68).

Nine jurors were stricken for cause because they indicated they could not be fair and impartial due to the nature of the allegations and/or their personal experience with sexual abuse: six before Juror 31 was examined, and three thereafter.¹ Two

¹ Juror 33 (PTSD, molested as child)(10/7/15 Supp VRP 11-12); Juror 41 (daughters were molested)(supra at 13); Juror 8 (emotional reaction during questioning)(supra at 27); Juror 20 (unable to sit through graphic evidence)(supra at 28); Juror 34 (unable to sit through graphic evidence)(supra at 32); Juror 2 (incest survivor and therapist for child sexual assault victims)(supra 10, 14, 52-

additional panel members were excused for other reasons: Juror 22 because of a family member's health situation (supra at 19); and Juror 1 because of his strong slant in favor of law enforcement officers (supra at 34).

Defense counsel neither challenged Juror 31 for cause nor exercised a preemptory challenge to remove Juror 31.

3. Legal financial obligations.

At the sentencing hearing the state put forward its recommendations for legal financial obligations and court costs, which were not objected to by defense counsel, and which were adopted by the court. (11/30/15 RP 491, 492).

In the discussion about the defense expert's witness costs, defense counsel stated, "I'm guessing it's somewhere around 1,500 bucks, somewhere around there, and if the Court wants to assess that along with the rest of the legal financial obligations, Mr. Wilson's presumably going to be incarcerated for quite some time and wouldn't be able to start making payments on any of that until he got out." (11/30/15 RP 492).

59); Juror 22 (fiance's son has similar experience)(supra at 71); Juror 13 (formed an opinion and made a judgment of defendant during voir dire)(supra at 103); and Juror 28 (emotional, would believe the child without first hearing evidence)(supra at 107).

There was further discussion by the court about language in the judgment and sentence requiring defendant to pay the costs of polygraph exams. The court inquired of the state, and then commented that the “legislature’s going to make sure we don’t charge anybody anything”, before deciding not to require defendant to pay those particular costs. (11/30/15 RP 500).

Defendant, on his counsel’s advice, did not address the court at sentencing. (11/30/15 RP 498).

The court imposed the fines and fees requested by the State, and set the monthly payment at \$25.00 per month. As to repayment the Court stated, “Obviously while you’re in prison if you work, they’ll send me a \$1.43 or something to that effect, so we won’t violate you for not paying while you’re in prison. Once you get out of prison, then we’ll take a look at your finances at that time. (11/30/15 RP 502-503).

C. AUTHORITY AND DISCUSSION

1. Defendant received effective assistance of counsel.

Defendant contends he received ineffective assistance of counsel when Juror 31, who indicated she was molested as a child, was not stricken from the jury panel despite her assurance that she could be a fair and impartial juror. Such a position was addressed

and rejected in the recent case of *State v. Lawler*, 194 Wash. App. 275, 374 P.3d 278, 285, review denied, 186 Wash. 2d 1020, 383 P.3d 1027 (2016).

To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *State v. Grier*, 171 Wash.2d 17, 32–33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33, 246 P.3d 1260. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the trial would have been different. *Id.* at 34, 246 P.3d 1260. We begin our analysis with a strong presumption that counsel's performance was reasonable. *Id.* at 33, 246 P.3d 1260. To rebut this presumption, the defendant must establish the absence of any “ ‘conceivable legitimate tactic explaining counsel's performance.’ ” *Id.* (emphasis added) (quoting *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. *Grier*, 171 Wash.2d at 33, 246 P.3d 1260.

State v. Lawler, 194 Wash. App. 275, 289. “In determining whether trial counsel was deficient, ‘the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy.’”

State v. Donald, 68 Wash. App. 543, 550, 844 P.2d 447, 451 (1993)(citing *In re Rice*, 118 Wash.2d 876, 888-89, 828 P.2d 1086 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065), cert. denied, --- U.S. ----, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992)).

In *Lawler*, a potential juror who stated some doubt as to his ability to be objective and follow the court's instructions because of sexual abuse suffered by family members was nevertheless seated on the jury; defense attorney made no attempt to strike the juror for cause; nor did he bump the juror using a peremptory challenge; and there was also no attempt to rehabilitate the juror or clarify his reservations.

Applying the highly deferential standards afforded to trial counsel wherein effective assistance is presumed, the burden shifts to the defendant to "establish the absence of any conceivable legitimate tactic for not excusing" a juror. *State v. Lawler*, 194 Wash. App. at 290. In *Lawler*, the appellate court noted defense counsel's possible "strategic and tactical" decision for favoring a juror who gave a poor verbal response may have been supported by other information such as "background, other personal characteristics, mannerisms, or nonverbal communication," and, as such, constituted effective representation. *Id.*

In the case at hand, unlike in *Lawler*, Juror 31 was unequivocal in her response that she could be a fair and impartial juror. Additionally, defense counsel's efforts exceeded those of the defense counsel in *Lawler* when he engaged Juror 31 in

conversation, including to got her to acknowledge that perceptions aren't always accurate.

Even under *State v. Irby*, 187 Wash.App. 183, 197, 347 P.3d 1103 (2016), cited by the defense, it is only when the potential juror demonstrates “actual bias” is it manifest constitutional error to seat such a juror. In *Irby*, a potential juror stated she “would like to say he’s guilty, and she was not asked any follow up questions nor any attempt made to gain any assurance of an open mind on the issue of guilt. Under those circumstances, the only conclusion the reviewing court could reach was that the juror had demonstrated actual bias.

Even where jurors express some bias or reluctance towards impartiality, the courts recognize that juror rehabilitation and juror assurances of impartiality neutralize bias concerns. See *Hughes v. United States*, 258 F.3d 453, 464 (6th Cir.2001)(cited in *State v. Irby*, supra). For example, in *Irby*, any actual bias concern with juror 27’s predisposition to believe police officers was negated when she responded, “I will try” to decide the case only on the evidence. *State v. Irby*, 187 Wash.App. at 196.

Although this is not a case where the court did not remove a juror sua sponte for cause or at defendant’s request, the following

discussion applies equally to the defense attorney who does not attempt to excuse a juror for cause or through the use of a peremptory challenge:

Case law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize that the trial court is in the best position to determine a juror's ability to be fair and impartial. It is the trial court that can observe the demeanor of the juror and evaluate and interpret the responses.

Considerable light will be thrown on the fairness of a juror by the juror's character, mental habits, demeanor, under questioning and all other data which may be disclosed by the examination. A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror. The supreme court, which has not had the benefit of this evidence recognizes the advantageous position of the trial court and gives it weight in considering any appeal from its decision. Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained.¹⁴ L. Orland & K. Tegland, Wash.Prac., Trial Practice § 202, at 332 (4th ed. 1986).

For the very reason that reasonable minds can well differ on this issue, we defer to the judgment of the trial court in this case. The trial court was in the best position to judge whether the juror's answers merely reflected honest caution based on her lack of prior jury experience or whether they

manifested a likelihood of actual bias. As Washington Practice explains, the trial court has, and must have, a large measure of discretion. On appeal, the party challenging the trial court's decision on the objection must show more than a mere possibility that the juror was prejudiced.(Italics ours.) L. Orland & K. Tegland, § 202, at 331.

State v. Noltie, 116 Wash. 2d 831, 839–40, 809 P.2d 190, 196 (1991).

Under the circumstances of this case, it can be seen from the record there was no actual bias present where defense counsel engaged the jurors in conversation, observed their body language, listened to their answers, challenged assumptions; gained concessions, explained his concerns, and challenged jurors for cause immediately and in the presence of the other jurors, and otherwise demonstrated that he was the best person at that moment to assess the potential jurors, including no. 31. As to Juror 31 specifically, other than to point to a quick verdict with 31 as the foreperson, defendant has not offered any evidence of actual bias. Since there was no actual bias present, there is no constitutional error to support a claim of ineffective assistance of counsel.

2. Sufficient evidence to support the conviction.

“The standard of review for a challenge to the sufficiency of the evidence” is whether, viewing the evidence “in a light most

favorable to the State, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' ” *State v. Sweany*, 174 Wash. 2d 909, 914, 281 P.3d 305, 307 (2012)(quoting *State v. Randhawa*, 133 Wash.2d 67, 73, 941 P.2d 661 (1997) (citation omitted) (internal quotation marks omitted) (quoting *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980))).

“As we have recognized, it is the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses.” *State v. Demery*, 144 Wash. 2d 753, 762, 30 P.3d 1278, 1283 (2001). “Credibility determinations are for the trier of fact and are not subject to review. This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wash. 2d 821, 874–75, 83 P.3d 970, 997 (2004)(citations omitted).

Rape of a child in the first degree occurs when a person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator who is, in turn, more than twenty-four months older than the victim. RCW 9A.44.073. Sexual intercourse is defined to include, in part, “any act of sexual contact

between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.” RCW 9A.44.073.

In this instance, B.L., a seven year old at the time of the allegations, testified that defendant placed his penis in her mouth. Defendant is substantially more than twenty-four months older than B.L.

As to the time, place, and nature of the abuse, the identity of the abuser, and the manner in which the disclosure came about, the jurors heard the testimony, observed the witnesses, and were otherwise in the best position to assess the credibility of B.L., her family, and of the defendant. The jury chose to believe B.L., and not the defendant. There was no guesswork involved.

3. Legal financial obligations were properly addressed.

The state and the defendant both addressed the imposition of legal financial obligations such as fines, fees, and costs at the time of sentencing. This is not a situation where the defendant passively stood by while the state made its financial recommendations which were summarily imposed by the court without further discussion. In this instance, although the court did not itself inquire into the defendant’s past, present, and future

ability to pay, his attorney, while addressing expert witness fees, indicated that such costs should be added to the other costs being requested by the state. The court noted that during defendant's imprisonment the court would receive a minimal amount that DOC would dock from whatever pay he would earn in prison, but that the court would not actively collect until after defendant's release. (11/30/15 RP 502-503).

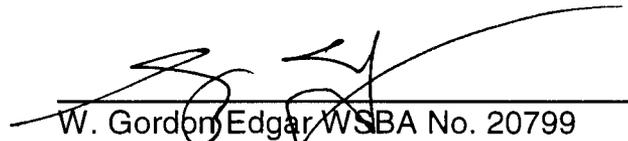
Had the court been advised of any financial difficulty of the defendant during the discussion of costs, including defense counsel's, the court would have been able to address the issue at that time.

Sentencing in this matter occurred on November 30, 2015. *State v. Blazina* was decided March 12, 2015. By not raising this matter at the time of sentencing well after *Blazina* was decided, and where defendant did in fact discuss financial issues, the appellate court can and should decline to address this issue. See *State v. Malone*, 193 Wash.App. 762 (2016); see also *State v. Lyle*, 188 Wash.App. 848, 355 P.3d 327 (2015).

D. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to uphold the jury's verdict and dismiss this appeal.

Respectfully submitted this
28th day of December, 2016



W. Gordon Edgar WSBA No. 20799
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,) NO. 33935-1-III
) Respondent,)
))
vs.) AFFIDAVIT OF MAILING
))
DALE WILSON,))
) Appellant.)

STATE OF WASHINGTON)
 : ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 4TH day of January, 2017, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing the original of this Affidavit and the original Brief of Respondent, addressed to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals III
500 N. Cedar Street
Spokane, WA 99201

Affiant also deposited in the United States Mail at Waterville, Washington, on January 4, 2017, with postage prepaid thereon, copies of this Affidavit of Mailing and the Brief of the Respondent, addressed to:

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Dale Wilson
#386164
Monroe Correctional Facility
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Sandra E. Hulse

SUBSCRIBED AND SWORN to before me this 4th day of January,
2017.



Jen Zeller

NOTARY PUBLIC in and for the State
of Washington, residing at East
Wenatchee; my commission expires
02/26/2019.