

34623-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL T. BARNES,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Where a timely objection would have cured any alleged error, has the Defendant shown manifest error permitting review?
2. Was the prosecutor's direct examination of the child victim sufficient to permit cross examination by the defense where Z.B. testified that, at the alleged location and time, the Defendant removed Z.B.'s clothes and touched Z.B.'s intimate areas ("the bad parts," "the back side and the front side") for a prolonged period and tried to make Z.B. touch the Defendant, all of which made Z.B. feel weird and uncomfortable?
3. Was defense counsel's performance prejudicially deficient for failing to complain about the sufficiency of the prosecutor's direct examination of the child victim?

IV. STATEMENT OF THE CASE

A jury has convicted the Defendant Michael Barnes of child molestation in the first degree of Z.B.. CP 96, 113-32.

In 2009, the Defendant began a relationship with Z.B.'s mother Amanda Brown. RP 30. She became pregnant, found out she had cancer, and after giving birth to her second child E.B., she had an emergency hysterectomy. RP 30-31. While she was recovering from the hysterectomy in February 2011 and multiple emergency reconstructive bladder surgeries in March 2011, the Defendant watched over Z.B. and E.B. at his grandparents' home on Irving Street in Pasco, Washington. RP 31-35, 49, 66-67, 122-24. Z.B. looked at the Defendant as a father and remains close with the Defendant's family. RP 32, 44-45, 61, 123.

About this time, E.B. suffered a broken arm, and the Defendant and Ms. Brown reported each other to CPS on multiple occasions. RP 56, 67. When Ms. Brown got out of the hospital, she was served with a restraining order which limited her to twice weekly contact with E.B. for a year. RP 34, 37, 50-53. Ms. Brown perceived that the Defendant's mother, not the Defendant, was behind the restraining order. RP 35, 40. She did not contest the order because she was still

going through major surgeries and because the Defendant told her that, regardless of the order, she could see her child whenever she wanted to. RP 52, 62. Ms. Brown and Z.B. continued to spend time with the Defendant and his family, and after some months she began to take E.B. home. RP 34-37, 53-55.

Z.B.'s behavior changed in 2013; he became unusually withdrawn. RP 41. That same year, Ms. Brown got a restraining order against the Defendant preventing him from having contact with E.B.. RP 37-38, 55. In 2014, she moved with her children to Ohio. RP 38. The Defendant did not challenge the order and did not express any objection about the move out of state. RP 40, 210-11. Ms. Brown was aware that the Defendant had fathered other children and had shown no interest in seeking custody of them. RP 41, 211-12. She had no concerns that he would seek custody of E.B.. RP 41.

In the spring of 2014, then seven year old Z.B. disclosed to a peer that the Defendant "made me pull on his penis and he pulled on my penis," and threatened to hurt Z.B.'s family if he told. RP 39-42, 56-57. Ms. Brown immediately contacted police. RP 39-42. Pasco officer Nathan Carlisle took telephone statements from Ms. Brown and Z.B.. RP 179-88. Although prosecution would require travel from

Ohio, Ms. Brown cooperated for Z.B.'s benefit and closure. RP 44.

On August 7, 2014, Z.B. was interviewed at Kids Haven in Kennewick. RP 88-89, 98. Z.B. was not comfortable talking to his mother or other females about the abuse. RP 42-43, 56-57, 71. He was scared and reluctant to talk to the forensic interviewer Mari Murstig, saying that the Defendant had threatened to hurt Z.B. if he told. RP 71, 98-99. However, he was willing to talk alone with Detective Jesse Romero. RP 71, 99-100.

In cross-examination, the defense elicited from Ms. Murstig that Z.B. said, the Defendant touched his "no-no" part more than five times. RP 108, 111-12. Z.B. said that the Defendant had taught him about putting no-no parts to another's bottom, suggesting that more than just touching may have occurred. RP 114-15.

Ms. Murstig testified that various factors can cause a child to be reluctant to disclose or relate abuse, including the severity of the abuse, the child's relationship with the abuser, threats or instruction not to tell, fear of retribution against oneself or one's family, and the infliction of physical pain. RP 95-97. A child victim may wait for a safe time to disclose. RP 97.

On April 13, 2015, the Defendant was charged with child

molestation in the first degree. CP 1.

In December of 2015, Z.B. was visiting relatives. RP 154. His aunt came into the room where eight year old Z.B. was playing with his five year old cousin K.S. and found them undressed and engaging in sexual behavior (K.S. was on top of Z.B. who was lying on the floor on his stomach). CP 32; RP 154-55. The aunt separated the children and spoke with them in different rooms. RP 156. Z.B. said he had taught K.S. and they had been engaging in this behavior since the summer. RP 156. When his aunt asked Z.B. why, he responded, "I don't know. Michael did it to me." RP 156. The aunt then brought K.S. to medical and law enforcement professionals to be sure that no adult had molested him. RP 157.

Following this disclosure, Z.B. was interviewed a second time at Kids Haven. RP 100-02; 129-30.

Psychologist Kenneth Cole testified that the mock or anal intercourse between Z.B. and K.S. was not normal developmental play. RP 164-65. The age difference between the cousins suggested that Z.B. was directing the acts. RP 166. The repetitive, compulsive, and intrusive nature of the behavior was a red flag; and the most likely cause of the behavior was sexual abuse of Z.B.. RP 165-67.

The detective also conducted a recorded interview with the Defendant. RP 120-24, 200, 203. The Defendant said he cared for Z.B. after the birth of E.B. while they were living in the basement of the Defendant's grandmother's house on Irving Street in Pasco for approximately a year. RP 121-22. He took care of the children while A.B. was ill and later when she would go to the store. RP 123, 125-26. Z.B. celebrated two birthdays at that house. RP 124. During social gatherings, the Defendant would retreat to the basement. RP 125. The Defendant said that he possibly touched Z.B. inappropriately when he changed Z.B.'s diapers or pull-ups. RP 124, 126.

The court held a pretrial child hearsay hearing and determined that "[t]he statements made on August 7, 2014, to Mari Murstig and Det. Jesse Romero are admissible in the State's case in chief." CP 2-14, 58, 111-12. The recorded interview was played for the jury. CP 30-33; RP 100; 102. The defense also elicited Z.B.'s hearsay statements to Ofc. Carlisle. RP 185, 187-88.

Z.B.'s testimony: Z.B. was nine years old when he testified at trial. RP 64. He said he had lived with his mom, his brother E.B., and

the Defendant in the basement of the Defendant's grandparents' home. RP 66, 73. His mother was sick a lot and was often in the hospital. RP 67. Z.B. recalled he was four or five and wearing pull-up diapers. RP 73-74. [Ms. Brown confirmed that when Z.B. moved in with the Defendant he was four years old and no longer wearing diapers, except for the pull-up pants he wore to sleep. RP 45. He stopped wearing pull-ups to bed shortly after moving in with the Defendant. RP 59. He celebrated his fifth birthday at the Irving home. RP 36, 59-60.]

Z.B. testified that on more than one occasion, when he was alone with the Defendant in a room downstairs changing his clothes and everybody else was upstairs, the Defendant touched Z.B. in a way that made him feel weird or uncomfortable. RP 68-70, 73, 76-79. Z.B.'s clothes would be removed, and the Defendant would touch stuff, "the bad parts," "the back side and the front side." RP 69. It felt weird. RP 69-70. The touching went on for a very long time. RP 72. The Defendant wanted Z.B. to touch him, but Z.B. refused, and the Defendant did not remove his own clothes. RP 69, 77. Z.B. was afraid to tell anyone. RP 70.

Z.B. testified that he had met with Mari Murstig and Detective

Romero in Kennewick and told them that the Defendant had touched him. RP 71-72.

Z.B. testified that the previous Christmas, an adult caught him playing a game with his four or five year old cousin called “boyfriend and girlfriend” where they touch each other on those “same parts.” RP 80-82.

V. ARGUMENT

A. THE APPEAL MUST BE DENIED WHERE A TIMELY OBJECTION WOULD HAVE REMEDIED ANY ALLEGATION OF ERROR RAISED NOW THE FIRST TIME ON APPEAL.

In this appeal, the Defendant challenges the admission of the same evidence (the Kids Haven video) under two different theories. Both claims require the Defendant demonstrate actual prejudice. *State v. Kirkman*, 159 Wn.2d at 927; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Both claims rely upon the alleged premise that the prosecution failed to make a sufficient direct examination of the child victim prior to the admission of the video. Appellant’s Brief (AB) at 5-7 (alleging prosecutor should have asked Z.B. about Kids Haven interview), 9 (alleging defense should have objected when prosecutor failed to ask

Z.B. certain questions). However, following the direct examination and before the admission of the video, the defense made no timely objection. AB at 9 (acknowledging error was unpreserved). Accordingly, the challenge was not preserved for review. RAP 2.5(a).

Therefore, before the court accepts review, it first must be satisfied that the Defendant has demonstrated manifest constitutional error. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125, 130 (2007). The exception is a narrow one, affording review only of certain constitutional questions. *State v. Kirkman*, 159 Wn.2d 91 at 934. An insufficient trial record will result in denial of review. *Kirkman*, 159 Wn.2d 91 at 935. In the same vein, if an objection could have permitted the trial to correct the error, review of the claim will be denied. *Id.*

In this case, the claim is that the prosecutor should have asked more questions of Z.B.. Assuming *arguendo* that the questions were not asked or should have been asked, if the defense had objected on this basis, the prosecution could have remedied by asking additional questions. Because an objection would have cured any alleged error, it is not manifest, and review must be denied.

B. THE COURT DID NOT ERR IN ADMITTING THE INITIAL KIDS HAVEN INTERVIEW FOLLOWING SUFFICIENT DIRECT EXAMINATION OF THE CHILD VICTIM TO PERMIT A PROPER CROSS EXAMINATION.

The Defendant claims the prosecutor failed to ask Z.B. whether he told Ms. Murstig about the alleged incident and what details he shared. AB at 7. The Defendant argues that this deficiency meant that Z.B. was not subject to full cross examination at trial.

A recent case from this Court is directly on point: *State v. Bates*, 196 Wn. App. 65, 383 P.3d 529 (2016), *review denied*, 188 Wn.2d 1008, 394 P.3d 1008 (2017). There, the court observed that before offering testimonial hearsay at a trial, the State must elicit the damaging testimony from the witness so that the defendant may cross-examine if he so chooses. *State v. Bates*, 196 Wn. App. at 67. The direct examination must be broad enough to open the door to cross-examination of all the damaging information provided by the child. *Bates*, 196 Wn. App. at 67-68.

Bates was convicted of two counts of child rape in the first degree. *Bates*, 196 Wn. App. 69, 71. S.J. testified that on one occasion, the defendant turned her upside down and licked her private parts. *Bates*, 196 Wn. App. at 71. When her grandmother

knocked, they put their clothes back on. *Id.* S.J. said, on a second occasion, when they were on the downstairs couch, the defendant touched her private parts with his hand. *Id.*

In the relevant details, the instant case is identical to the *Bates* matter:

When asked if she remembered talking “to a lady about it when you colored with markers” (from the videotape, jurors would have known this was Ms. Murstig), S.J. said that she did. RP at 296. She said she had told the lady about what happened with Mr. Bates. The prosecutor did not ask S.J. to tell the jury anything about the content of her interview by Ms. Murstig.

Id.

The *Bates* court noted that (1) the defendant actually cross-examined S.J. about statements she made to Ms. Murstig, (2) the state did not object to any cross-examination as being outside the scope, and (3) the state’s direct examination did not force the defense to limit cross-examination of call S.J. as a witness. *State v. Bates*, 196 Wn. App. at 75.

Here, the Defendant Barnes argues that the prosecutor failed to ask Z.B. whether he told Ms. Murstig about the alleged incident and what details he shared. AB at 7. In fact, the question was asked. RP 71.

Q. Do you ever remember meeting with the one lady at the building over in Kennewick about a year ago, and she's a real short lady? Her name's Mari?

A. Yeah.

Q. Do you remember talking to her?

A. Uh-huh.

Q. And you didn't really want to talk to her, either?

A. Un-uh.

Q. You'd rather talk to Jessie?

A. Yeah.

Q. Do you remember any of the stuff you told her?

A. I told her that he touched me.

RP 71.

In direct examination, Z.B. testified to every element of the child molestation. He testified that at the alleged time and location, the Defendant removed Z.B.'s clothes and touched his intimate areas. Z.B. described these areas as "the bad parts" under his clothes, "the back side and the front side." RP 69. The touching made Z.B. feel weird or uncomfortable. RP 68-70, 73, 76-79. It was a touching that he did not feel comfortable talking about to females. RP 70. The touching went on for a very long time. RP 72. The Defendant also wanted Z.B. to touch him, but Z.B. refused. RP 69, 77.

If the meaning of those "parts" wasn't clear by inferences and tone, Z.B. gave additional testimony. Z.B. testified that, pending trial, he played "boyfriend and girlfriend" with his cousin. RP 81. The

game involved touching each other on the “same parts.” RP 81-82. Z.B.’s aunt explained that the cousins had been naked and simulating anal sex. RP 155.

The defense cross examined Z.B.. RP 74-79, 84. It does not appear that the defense was limited in cross-examination in any way. The defense specifically asked about Z.B.’s interview with Ms. Murstig and the detective. RP 75-76. Z.B. also marked the “parts” on the body map. RP 101-02 (plaintiff’s exhibit 6). Immediately after cross examining Z.B., the defense stipulated to the admission of the body map. RP 84-85.

On this record, the challenge must be denied on the merits. The prosecutor made a sufficient direct to allow for a thorough cross examination.

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Making the same claim under a different theory, the Defendant claims his counsel provided ineffective assistance in failing to prevent the admission of the first Kids Haven interview. AB at 8.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney’s

performance was deficient and (2) that this deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. at 687.

Deficient performance is that which falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d at 334-35.

To demonstrate prejudice, the Defendant must show a reasonable probability that but for the deficient performance, the outcome of the trial would have been different. *In re Crace*, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

The analysis of any claim of ineffective performance begins with a “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The Defendant bears the burden of proving that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 406 U.S. at 689 (1984).

It is immaterial that this strategy ultimately proved unsuccessful; hindsight has no place in the analysis. See *Strickland*, 466 U.S. at 689; cf. *State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) ("The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off.").

The Defendant claims the State's case "rested on Z.B.'s hearsay statements to Ms. Murstig." AB at 8. This is not the record. First, Z.B.'s testimony on its own was sufficient to establish the elements. And, second, Z.B. did not talk to Ms. Murstig. The record establishes that, in the first Kids Haven interview, which was the only one admitted to the jury, Z.B. refused to talk to Ms. Murstig and requested to speak alone with Detective Romero.

The claim of error has been addressed above. The State's direct examination of the victim provided defense counsel with sufficient opportunity to question Z.B.. If defense preferred additional direct examination, a timely objection would have accomplished that

purpose. However, such additional questioning would only have buttressed the State's already sufficient case. Therefore, the choice against making an objection was a legitimate strategy; it is not deficient performance.

Because an objection would not have resulted in suppression of the tape, but only in further (likely more emotional) testimony by Z.B., the Defendant cannot show prejudice.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: September 18, 2017.

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED September 18, 2017, Pasco, WA


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