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Division III
State of Washington
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35128-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ASIL L. HUBLEY, APPELLANT

Consolidated with 35516-1-III

IN RE PERSONAL RESTRAINT PETITION OF ASIL L. HUBLEY

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED ON DIRECT APPEAL

Did the trial court err by refusing to find that counts II and III arose out of the same course of criminal conduct for the purposes of calculating the offender score?

II. STATEMENT OF THE CASE

The State charged Mr. Hubley with one count of second-degree child molestation, one count third-degree child molestation, one count third-degree child rape, and one count first-degree child rape. CP 59-60.

In count I, the State alleged Mr. Hubley engaged in sexual contact (second degree child molestation) with L.H. from July 09, 2010 to July 18, 2011, when L.H. was 13 years of age. Count II alleged Mr. Hubley engaged in sexual contact with L.H. between July 19, 2011 and August 30, 2012, when L.H. was 14-15 years of age (third degree child molestation). Count III (third degree child rape) alleged Mr. Hubley engaged in sexual intercourse with L.H., between August 01, 2012 and August 31, 2012, when L.H. was 15 years old. Count IV (first-degree child rape) alleged Mr. Hubley engaged in sexual intercourse with Z.H., between June 01, 2012 and December 31, 2012, when Z.H. was 7 or 8 years old.

The State also alleged aggravating factors for counts I and II: that the offense was part of an ongoing pattern of sexual abuse manifested by multiple incidents over a prolonged period of time. CP 59-60.

The jury found Mr. Hubley guilty on all four counts. The jury also found the aggravating factor for count II, third-degree child molestation. RP 411-12; CP 146, 148, 150, 151. Mr. Hubley timely appealed his convictions. CP 208.

At trial, L.H. testified Mr. Hubley molested her from 2010, when she was 13-years old, until after she reached the age of 15. RP 266-73. She explained how Mr. Hubley would wake her from her sleep, and take her to his office where he would have her lay down and pull down her pants. RP 266. He would then slide his hand over her vagina to see if she had “been with any boys.” RP 267. After he finished his “check,” he gave her five dollars and told her to leave. RP 266-67.

About three days after the first incident, he touched L.H.’s vagina again, the way a doctor would check. Once again, he gave her money after he finished and told her to leave. RP 268. L.H. described another incident when Mr. Hubley came into the bathroom while she was taking a shower and told her he was going to check again to see if she had been with any boys. She testified Mr. Hubley told her to bend over and when she did, he started touching her vagina. Then, he started washing her. RP 268. L.H. said this happened again in Mr. Hubley’s bedroom. But when he touched her vagina that time, she felt a burning sensation. She realized he had used hand sanitizer before he touched her. RP 269. L.H. told the court when she turned

age 14, the touching continued every other day when no one was at home. But by then, Mr. Hubley had progressed from using his hand on her vagina to using his penis when she was age 15. RP 269-70.

L.H. also described an incident when Mr. Hubley called her in to his room and told her to lie down and check his phone. She did, and he pulled down her pants and got on top of her. He started to touch her with his hand, and then with his penis. When she felt his penis inside her vagina, she told him it hurt, and he stopped. RP 271-72.

Around the same time L.H. told her grandparents about the abuse and the police responded, Z.H.'s foster mother, Jamie Ewen, called CPS to report similar claims regarding Z.H. RP 273, 245. Ms. Ewen testified that one day after a visit with Mr. Hubley, Z.H. told her that he had touched her with his hand and with his penis. RP 244. Ms. Ewen testified Z.H. told her Mr. Hubley would make her shower with L.H. and touch her vagina. RP 244.

Z.H. testified that when she was either 7 or 8 years old, Mr. Hubley touched her "no-no square," her term for vagina, with his "no-no square," her term for penis, and it felt weird. RP 28-29, 227-28. Ms. Ewen testified Z.H. told her this happened multiple times when she and L.H. shared a bed with Mr. Hubley, and Z.H. witnessed Mr. Hubley do the same to L.H. RP 244.

III. ARGUMENT

THE DEFENDANT FAILED TO MEET HIS BURDEN OF PROVING COUNTS II AND III AROSE OUT OF THE SAME COURSE OF CRIMINAL CONDUCT FOR THE PURPOSES OF CALCULATING THE OFFENDER SCORE.

Defendant claims that the third-degree child molestation¹ of L.H, occurring between July 19, 2011 and August 30, 2012, and the third-degree rape² of L.H., occurring between August 01, 2012 and August 31, 2012, must be scored as arising out of the same course of criminal conduct. This claim was raised at sentencing and failed there. RP 422, 426-29, 434-35; CP 169-71. Similarly, it fails here because defendant cannot establish the record supports only one conclusion on whether these crimes require the same criminal intent, and were committed at the same time and place.

For sentencing purposes, “[m]ultiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim.” *State v. Walker*, 143 Wn. App. 880, 890, 181 P.3d 31 (2008). If any of the three elements is missing, “a trial court must count multiple offenses separately when calculating a defendant’s offender score.” *Walker*, 143 Wn. App. at 890. Appellate courts review determinations of same criminal conduct “for abuse

¹ Count II.

² Count III.

of discretion or misapplication of law.” *State v. Graciano*, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). Under this standard, “when the record supports *only one* conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38 (emphasis added). Otherwise, as here, where the record “adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 538. Additionally, the burden is on the defendant to “establish the crimes constitute the same criminal conduct.” *Id.* at 539.

In the case at hand, the record does not indicate that the incidents resulting in counts II and III occurred at the same time and place. Victim L.H. discussed the incidents as separate events occurring repeatedly, but at separate times. The molestation conduct charged in count II occurred several times over a four-year period. Indeed, the multiple-yet-separate molestation events constituted an ongoing pattern involving *multiple* incidents which supported the jury’s aggravated finding on count II.³ L.H. testified that the conduct charged in count III occurred on a single occasion, in a narrower time frame, and she did not state that it was a direct result of any other conduct charged. Based on this analysis, the defendant has failed

³ The jury unanimously found by separate interrogatory that the molestation in Count II “Was ... part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by *multiple incidents over a prolonged period of time.*” CP 149.

to show that the incidents occurred in the same time and place. That is his burden. *See id.* at 539 (citing *State v. Lopez*, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007) (“In determining a defendant’s offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct”); and *see In re Pers. Restraint of Markel*, 154 Wn.2d 262, 274, 111 P.3d 249 (2005) (“[A] ‘same criminal conduct’ finding is an exception to the default rule that all convictions must count separately. Such a finding can operate only to decrease the otherwise applicable sentencing range”). Because a same course of conduct finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct. “[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” *Graciano*, 176 Wn.2d at 536 (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)).

Here, at best, defendant could allege only that the offenses *may* have occurred at the same time and place. However, he cannot refute that the record also supports a finding that acts of molestation occurred days, or months, or a year prior to the rape. Where the record “adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 538. The trial court did not abuse its discretion in deciding the defendant failed to

establish that the crimes only occurred at the same time and only occurred with the same objective intent without the defendant having time to pause and reflect⁴ before continuing from a completed molestation to the rape.

IV. ANSWER TO DEFENDANT'S PERSONAL RESTRAINT PETITION.

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Defendant Hubley is restrained by the convictions discussed above. He currently resides at Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington. He was sentenced February 14, 2017, to a term of 276 months in prison with lifetime sex offender supervision. RP 438, 461; CP 192-207.

B. ISSUES PRESENTED BY PETITIONER.

1. First and Second Grounds.

Petitioner claims, as best translated by this respondent, that there was no crime scene, no forced entry, and no DNA. In his second ground, petitioner claims that there was insufficient evidence. There was more than

⁴ In determining criminal intent, the Washington Supreme Court has held that the relevant inquiry is to what extent the criminal intent, when viewed objectively, changed from one crime to another. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). This analysis includes whether the crimes occurred simultaneously, and whether one act furthered another. *Id.*; see also, *State v. Grantham*, 84 Wn. App. 854, 858, 932, P.2d 657 (1997) (defendant completed first rape before proceeding to the second; the court found defendant had time to “pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act”).

sufficient evidence, as outlined above, to support each conviction. Taken as a general complaint regarding the sufficiency of the evidence, the trial evidence included the testimony of both victims, L.H. (RP 261-277) and Z.H. (RP 223-234, discussing rape at 228), as well as a video of Z.H.'s forensic interview, (P-1, introduced at RP 255.). The victims' testimony regarding the sexual assaults, as well as the testimony of others corroborating the time and place of the complaints, is more than sufficient evidence to support the convictions.

Appellate courts assume the truth of the State's evidence, *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); view reasonable inferences from the evidence in the light most favorable to the state, *id.*; and deem circumstantial and direct evidence equally reliable, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Applying these principles, there was sufficient evidence presented at trial for a rational jury to find that the defendant committed the offenses.

Petitioner also claims there were references to O.J. Simpson and such comments were "improper litigation conduct" or "prosecutorial misconduct." Defense counsel, not the State, made two strategic references to O.J. Simpson's case, one in voir dire (RP 200), and one during closing argument (RP 394). Both brief comments were made only to remind the jury that proof is necessary, that *mere belief* that something happened is not

enough. These were strategic, tactical, decisions, made by the defense and not the State, and neither statement establishes deficient performance or prejudice.

To demonstrate ineffective assistance of counsel, Mr. Hubley must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If he fails to satisfy either prong, this Court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, Mr. Hubley must demonstrate there is a probability that, but for his counsel's deficient performance, "the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. There is a strong presumption of effective assistance, and Mr. Hubley bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). A strategic reason was given and explained to the jury, and, therefore, Mr. Hubley fails to establish either prong of his ineffective assistance claim.

2. Third Ground.

Defendant claims there were no African Americans on his jury. This claim does not justify a response because Mr. Hubley does not allege any bias or error in the jury selection process. Additionally, he fails to support this “claim” with any evidence or cogent argument. Relief will only be granted in a PRP if there is constitutional error that caused substantial actual prejudice or if a nonconstitutional error resulted in a fundamental defect constituting a complete miscarriage of justice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). It is the petitioner’s burden to establish this “threshold requirement.” *Id.* To do so, the petitioner must present *competent* evidence in support of his claims. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Mr. Hubley fails to establish any fact regarding the ethnic composition of the jury panel. The petitioner may not rely on conclusory allegations, but must show with a preponderance of competent, admissible evidence that the error caused him prejudice. *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 636, 362 P.3d 758 (2015); *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Without more, these types of claims are not reviewable. *See Matter of Moncada*, 197 Wn. App. 601, 604-06, 391 P.3d 493 (2017).

3. Fourth Ground.

As best as can be gleaned from the defendant's claim of "evidentiary error," his fourth ground involves a claim that his right of confrontation was violated. However, both victims testified and were subject to cross-examination; therefore, this claim presents no facts supporting the alleged violation, nor any analysis of how this claim, if established, would have been harmful to his case.

4. Fifth Ground.

Defendant apparently claims that the victims who appeared and testified at trial may not have been the *actual* victims, but rather doppelganger cousins or twin sisters. Additionally, he claims that Z.H. told his child custody lawyer that "daddy did nothing to her" and that this inconsistent statement is likely to be true. Again, defendant fails to establish any claim with any admissible evidence, and fails to establish whether this "evidence" was known, or is newly discovered, or what, if any, effect it would have on the outcome of the case. *See In re Rice*, 118 Wn.2d at 885-86. It should not be reviewed.

5. Sixth Ground.

Petitioner states the "Prosecution never proved [he] [was] capable of crimes." The prosecution actually did prove he was capable of crimes

because the jury decided, beyond a reasonable doubt, that the defendant committed the crimes.

Defendant also claims the court allowed Simon and Glenda DeWater's statements into evidence although they were not in court to testify. The only references in this regard appear to be a fleeting reference by Deputy Robert Brooke that he spoke with Glenda Dewater before speaking with L.H., and that he had also spoken with L.H.'s grandfather Simon Dewater. RP 302-03. It was Mr. Hubley who, thereafter, mentioned Mr. Dewater when he alleged that the abuse complaints never started until he signed the paperwork allowing Mr. Dewater to assume temporary, split custody of four of the children. RP 327. The defendant fails to establish any error in this regard, and moreover, fails to establish what, if any, effect, such tangential comments had on the case.

Defendant also asserts that his offender score was miscalculated because the offenses (counts II and III) should have been scored as arising out of the same course of conduct. The State answered this claim above and will not repeat the same arguments here.

Mr. Hubley has failed to raise any viable argument as to why his conviction should be reversed. His PRP should be dismissed.

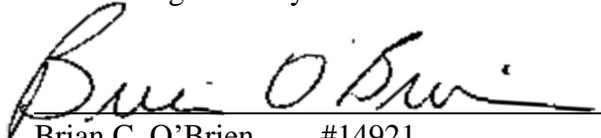
V. CONCLUSION

As to the direct appeal, the trial court did not abuse its discretion in deciding that the defendant failed to establish that the crimes in counts II and III *only* occurred at the same time. He also failed to establish that these same crimes *only* occurred with the same objective intent without the defendant having time to pause and reflect before continuing from a completed molestation to the rape of a child.

In his PRP, Mr. Hubley fails to establish actual prejudice for any alleged constitutional error, and has failed to establish any fundamental defect resulting in a complete miscarriage of justice pertaining to any nonconstitutional error, as is required.⁵

Dated this 21 day of August, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

⁵ For alleged constitutional errors, “[a] petitioner has the burden of showing actual prejudice ...; for alleged nonconstitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice.” *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007). The petitioner must make these heightened showings by a preponderance of the evidence. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. ASIL HUBLEY, Appellant,	NO. 35128-9-III Consolidated with 35516-1-III CERTIFICATE OF MAILING
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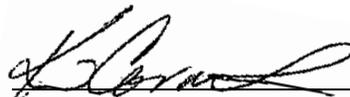
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