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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff / Respondent, vs. JESSE MATTHEW YOUNG, Defendant / Appellant.	COA NO. 35642-6 SUPERIOR COURT NO. 15-1-02882-1

BRIEF OF APPELLANT

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Assignment of Error

1. The Trial Court erred by finding the Appellant competent to stand trial based on the report and testimony of an unqualified expert.
2. The Trial Court erred by permitting witnesses without specialized training and experience to give opinion testimony regarding the voluntariness of the waiver of constitutional rights by a person with developmental disabilities.
3. Performance of counsel was deficient in failing to present evidence of Mr. Young's inability to knowingly and voluntarily waive his constitutional rights based on his developmental disability.

Statement of the Case

In February 2014 Amy Johnson took her then eight year old daughter F.J. to counseling with La Donna Remy because of disruptive behavior patterns. (RP 026) Services were provided through March 2016, with a short break when the family moved from the area. (RP 028)

On January 15, 2015, prior to F.J.'s counseling session, Amy Johnson told Ms. Remy that F.J. had downloaded pornography onto a lap top. (RP 035, 037) She also revealed that on December 4, 2014 she had discovered bloody tissue and an adult sex toy in F.J.'s closet. (RP 037)

During the counseling session, which was attended by Amy Johnson, F.J. disclosed that a female cousin (one year older than F.J.) had touched her bottom while bathing, but denied anyone had ever touched her inappropriately. (RP 037) When asked who had shown her how to download pornography F.J. responded that "[h]e is kind of a family member. (RP 043-44) Amy Johnson then asked if the person was the Appellant, Jesse Young, to which F.J. responded with a nod of her head. (RP 044)

At a separate counseling session on February 19, 2015 F.J. disclosed to La Donna Remy that on numerous occasions, while visiting staying overnight with her grandparents, her uncle Jesse Young had touched her vagina with her hand. (RP 045) She stated this had happened

"a lot" since the age of 5. (RP 045, 047-48) During another counseling session on May 4, 2015, after attending her first law enforcement forensic interview, F.J. disclosed that Jesse Young had touched her with his penis, although she denied any penetration. (RP 048-49)

As a result of the disclosure on February 19, 2015 an investigation was initiated into the allegations of sexual assault against F.J. by Jesse Young. (RP 517) A forensic interview was conducted by Karen Winston on March 18, 2015. (RP 116) During this interview F.J. disclosed she had been sexually assaulted by Mr. Young. (RP 119-20)

Jesse Young was interviewed by detectives of the Spokane Police Department on April 2, 2015. (RP 177) The detectives had been informed prior to the interview that Jesse Young had a developmental disability. (RP 174) During this interview, wherein the detectives employed the Reid Interrogation Method, Jesse Young was asked to write a letter of apology to the alleged victim, F.A., which he did. (RP 191) He was asked to draw a map of the locations where the alleged events took place, which he did (RP 192) After more than an hour of interrogation, when asked how many times he had sexual contact with F.J. he responded, "a few. Four." (RP 570-71)

On July 31, 2015 Jesse Young was charged with two counts of Rape of a Child in the First Degree and one count of Child Molestation in

the First Degree. (CP 001-02) In each count alleged an aggravating circumstance 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. **RCW 9.94A.535(2)(g)(3)(g)**. (CP 001-02)

On September 4, 2015 an Order for Stay was entered in the case for the purposes of determining Mr. Young's competency to stand trial and his capacity to understand and waive his constitutional rights. (CP 009-013) Because of his identified developmental disabilities the order included the requirement that his evaluation include the opinion of a Developmental Disabilities Professional, as defined in **RCW 10.77.010(8)**. The matter was referred to Daniel Lord-Flynn, as staff psychologist at Eastern State Hospital. (CP 014-15) Mr. Young was deemed competent to stand trial and an order was entered on July 5, 2016. (CP 014-15)

The pretrial hearing on the admissibility of statements made by Mr. Young to law enforcement, as required by **CrR 3.5,** started on August 18, 2017. (RP 79) Daniel Lord-Flynn testified regarding the issue of Mr. Young's ability to knowingly and voluntarily waive his Miranda Rights.[1] (RP 87-96) He concluded that, in his opinion, Mr. Young "likely" had the capacity to knowingly and voluntarily "waive Miranda." (RP 097). At the

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[1] **Miranda v. Arizona**, 384 U.S. 436 (1996).

conclusion of testimony on the issue the court ruled the statements made by Mr. Young were admissible at trial. **CrR 3.5**. (RP 225-27)

The matter proceeded to trial by jury on August 22, 2017. (RP 259) The matter was submitted to the jury for deliberation on August 28, 2017. (RP 771) A verdict of Guilty returned on all three counts the same day. (RP 776; CP 124, 127, 130) The jury also found an ongoing pattern of abuse for each charge. (RP 776; CP 125, 128, 130) The Court imposed a of 180 months on each Rape of a Child count and 120 months for Child Molestation. (CP 161-175) This appeal follows. (CP 084)

Argument

A. Competency evaluation required the opinion of a Developmental Disabilities Professional

Because of Mr. Young's documented developmental disabilities, both his competency to stand trial and his ability to knowingly and voluntarily waive his constitutionally protected right against self-incrimination were called into question. The order entered by the court requiring an evaluation of Mr. Young included specific language requiring the evaluation be conducted by a Developmental Disabilities Professional. (CP 009-013) A "developmental disabilities professional" is defined as: a person who has specialized training and three years of experience in directly treating or working with persons with developmental disabilities and is a psychiatrist or psychologist, or a social worker, and such other developmental disabilities professionals as may be defined by rules adopted by the secretary." **RCW 10.77.010(8)**.

Daniel Lord-Flynn, a trained psychologist employed at Eastern State Hospital was assigned to handle Mr. Young's evaluation. During his testimony, Dr. Lord-Flynn outlined his education and training. He has experience working in geropsychiatry, a subspecialty of psychiatry dealing with mental health and illness in the elderly.[2] (RP 79-80) He conducts

[2] http://medical-dictionary.thefreedictionary.com/geropsychiatry

evaluations under RCW 10.77 for competency. (RP 080) He also testified that he does additional evaluations on topics such as competency to waive Miranda, susceptibility of providing a false confession, evaluations of mental stability at the time of the act. (RP 080) His practice focus is on the forensic evaluation of adults and children. (RP 614)

The Court erred in making a finding that Mr. Young competent to stand trial without the input of the statutorily mandated and court ordered developmental disabilities professional. There is no evidence in the record to support the conclusion that Dr. Lord-Flynn is a qualified Developmental Disabilities Professional. His qualifications are devoid of any indication that he has engaged in any specialized training regarding developmental disabilities. Nor is there any indication that his experience includes directly treating or working with persons with developmental disabilities. Each of these elements is required by statute to qualify as a Developmental Disabilities Professional. **RCW 10.77.010(8)**. Dr. Lord-Flynn's report was insufficient by itself to reach a conclusion of competency, as the Court did here. (CP 014-015)

Reliance upon Dr. Lord-Flynn's assignment to this case by Eastern State Hospital in response to the Court's order is not dispositive of his qualification as a Developmental Disabilities Professional. His testimony indicates he learned of Mr. Young's developmental disabilities not upon

receipt of the Court's order, but when he was informed of the issues by counsel. (RP 85-86) Based on that input he conducted additional research into Mr. Young's background before writing his report. (RP 86-87) Despite the order specifically indicating the existence of a developmental disability and the need for a qualified expert in that area, Dr. Lord-Flynn appears to have been assigned this case as a standard competency case.

Without the opinion of a qualified developmental disabilities professional, there was insufficient evidence to support the Court's finding of competence. Both the statute and the order required one, but none was provided. The issue of Mr. Young's competency to stand trial, therefore, remains open. The convictions in this case should be vacated and the matter remanded to the trial court for a proper determination on this point alone.

B. Waiver of Constitutional Rights not knowingly and voluntarily given

Our legislature has recognized the state's "obligation" to provide aid and services necessary for a person with a developmental disability to enjoy all rights and privileges under the Constitution and laws of the United States and the state of Washington. **RCW 71A.10.015**

A "developmental disability" is a disability attributable to a neurological condition that constitutes a "substantial limitation" to a person. **RCW 71A.10.020(5)**.

Under state and federal law, no person can be forced to give evidence against themselves. **U.S. Const., Amend V; WA State Cons., Art. I, Sec. 9.** With regards to confessions, a statement made by a person can be used against them if they understand their rights and then knowingly and voluntarily waive those rights prior to making a statement. **Miranda v. Arizona**, 384 U.S. 436 (1996). Public policy dictates that additional safeguards should be in place for persons with developmental disabilities to ensure they not just understand their rights, but the consequences of waiving those rights.

Mr. Young was contacted by law enforcement and brought in for questioning. At the time of the meeting the lead detective was aware Mr. Young was a person with a developmental disability and requested the assistance of another detective, Elise Robertson. (RP 173) Detective Robertson had received training on interviewing persons with "mental delay" and had conducted interviews in accordance with her training. (RP 174) Her interview technique consists of asking questions provided by the Spokane County Prosecutor's Office and her primary trainer to access the understanding the individual being questioned, witness or suspect, of "the

whole process and procedure." (RP 176, 552) The questionnaire is 18 pages however Detective Roberson has never personally completed all 18 pages during an interview. (RP 176) In this case she made it to page 7. (RP 177) Without specifically ever testifying to the fact, it appear Detective Roberson was "satisfied" Mr. Young could be interviewed and participated in that interview. (RP 558)

It was error for the Court to consider this testimony as an indication that Mr. Young knowingly and voluntarily waived his constitutional rights. The partial review of questions provided by the prosecutor's office hardly rises to the level of an evaluation of the ability of a person to understand "the whole process and procedure," let alone a determination that a suspect is making a knowing and voluntary waiver of their constitutional rights. Detective Roberson appears to have more experience reviewing the questionnaire, or at least parts of it, with more individuals, but in no way shows any expertise in the area.

It was further error to permit the State to introduce the fact this office document was used as a device to determine this issue. The use of this questionnaire gives false and undue credibility to the witness, who then testifies on a topic upon which she is not an expert. Any mention of the questionnaire and its function should have been excluded.

C. The cumulative effect of permitting testimony of unqualified witnesses creates prejudicial error

The error of permitting Detective Roberson to imply Mr. Young gave a knowing and voluntary waiver of his constitutional rights is far from harmless when combined with the other impermissible testimony on the same subject by Dr. Lord-Flynn. Despite his lack of expertise in the subject of police interrogation methods, he was also permitted to testify as to his opinion regarding Mr. Young's ability to waive his rights and give a voluntary statement during such an interrogation. (RP 636) He was not recognized by the Court as an expert in police interrogation methods and their effects on suspects. (RP 634) His experience on the topic of voluntariness of confessions includes a "couple dozen" examinations. (RP 081) And as indicated earlier, he has no expertise working with persons with developmental disabilities and therefore utilized techniques he uses with children in making his determination. (RP 631)

Neither of these witnesses was qualified to testify regarding the ability of Mr. Young to knowingly and voluntarily waive his rights. It was error for the Court to permit either witness to testify on this topic, and permitting both to testify results in a cumulative error that is far from harmless. The convictions should be overturned based on this reliance of such evidence.

D. Ineffective Assistance of Counsel

The right to effective assistance of counsel is guaranteed by both our state and federal constitutions. **U.S. Const. Amend. VI; WA Const. Art. I, Sec. 22**. Washington follows the standard articulated in **Strickland v. Washington** to determine whether a defendant had constitutionally sufficient representation. 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To demonstrate ineffective assistance of counsel, a defendant must show (1) defense counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) the defendant was prejudiced by the deficiency. **State v. Thomas**, 109 Wn.2d 222, 225-26 (1987) (adopting two-pronged test from **Strickland**, 466 U.S. at 687, 104 S.Ct. 2052). Ineffective assistance is a two-pronged inquiry: 1) a showing that counsel's performance was deficient, and; 2) the deficient performance was prejudicial. **Id.** To prevail a defendant must overcome "a strong presumption that counsel's performance was reasonable." **State v. Kyllo**, 166 Wn.2d 856, 862 (2009).

Mr. Young asserts that counsel's performance was deficient with regards to the issue of developmental disabilities professionals. First, counsel failed to challenge the qualifications of Dr. Lord-Flynn as a developmental disabilities professional. Second, counsel failed to retain

his own expert on that subject and Mr. Young's ability to knowingly and voluntarily waive his constitutional rights.

1. Failure to challenge the qualification of Dr. Lord-Flynn as a developmental disabilities expert

   a. Showing of deficiency

The order entered by the Court in this case is a variation of the evaluation order found at the state court website. The order specifically included instructions to the evaluator that there is a reason to believe the person being evaluated has a developmental disability. (CP 009-013) The form further directs the evaluation be conducted by a Developmental Disabilities Professional. (CP 009-013) The evaluation was conducted by Dr. Lord-Flynn, as assigned by Eastern State Hospital. (CP 014-015)

It appears that both the parties and the Court relied on Eastern State Hospital to appropriately assign this evaluation to a statutorily qualified person. During his testimony Dr. Lord-Flynn gave no indication he was specifically qualified to do this evaluation as a developmental disabilities professional. There were no questions by counsel to determine his qualifications as one. He simply did the evaluation, wrote the report used by the Court to determine competency, and then testified on the topics of competency and on the voluntariness of Mr. Young's confession.

At the bottom of every page of the Washington State Adult Sentencing Guidelines Manual counsel is reminded that "The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual." The Washington Rules of Professional Conduct requires that a lawyer provide competent representation, which is defined as the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. **RPC 1.1** Thoroughness includes "inquiry into and analysis of the factual and legal elements of the problem. . ." and adequate preparation. "The required attention and preparation are determined in part by what is at stake. . . ." **Id., note 5**.

Reliance upon Eastern State Hospital to assign an appropriate evaluator and failing to challenge the evaluator's credentials falls below the standard of preparation required of counsel.

b. *Showing of prejudice*

Based solely on the report of Dr. Lord-Flynn the Court found Mr. Young competent to stand trial. (CP 014-015) At trial Dr. Lord-Flynn was permitted to testify on topics related to developmental disabilities despite having no expertise in this area. Since Dr. Lord-Flynn's qualifications in this area were never questioned the prejudice to Mr. Young is pervasive. It

is untenable that failing to verify and challenge the qualifications of a proposed expert would be an acceptable trial strategy.

2. Failure to consult a developmental disabilities expert

a. Showing of deficiency

The focus of the defense at trial was on the manner in which the detectives conducted their interview with Mr. Young, and whether the resulting confession obtained was false. Expert testimony was presented by the defense through Dr. Richard Leo and vigorously pursued. (RP 417-57) Unfortunately, Dr. Leo's expertise in the area of police interrogation methods was insufficient to refute the testimony of Dr. Lord-Flynn and Detective Roberson that Mr. Young's waiver of his constitutional rights was given knowing and voluntary given his developmental disabilities.

b. Showing of prejudice

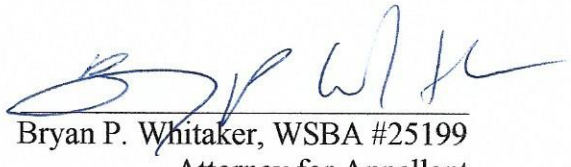
With no testimony to refute that given by unqualified experts the impact of Mr. Young's developmental disabilities was never fully explored by the defense. The result being the admission of testimony against his interest on both the issue of capacity and ability to understand the consequences of a voluntary waiver of his rights.

Conclusion

The Court ordered a competency evaluation that required a developmental disabilities professional. No such professional was involved in this case. Counsel failed to identify the deficiencies of the evaluator and provided no expert to contradict the finding of competency. The Court therefore relied on the opinion of a statutorily deficient evaluator when making the determination Mr. Young was competent to stand trial.

Counsel failed to offer an expert on the issue of developmental disabilities and how they might impact Mr. Young's ability to understand and waive his constitutional rights. Counsel further failed to object to the presentation of evidence presented by non-expert witnesses regarding Mr. Young's ability to understand and waive his rights. The most significant aspect of Mr. Young's defense was never fully developed and presented on his behalf, resulting in extreme prejudice. These convictions should therefore be reversed and the case remanded for new trial.

RESPECTFULLY SUBMITTED



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