

COURT OF APPEALS
CLARK COUNTY

NO. 37450-1-II

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

BY _____

STATE OF WASHINGTON, Respondent

v.

CARL GREGORY WILLIAMS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00326-6

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the Appellant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the court improperly allowed ER404(b) evidence relating to uncharged sexual misconduct alleged to have occurred between the named child and the defendant.

Specifically, the defense had wanted to keep out evidence that the defendant had continually engaged in sexual misconduct between the complainant and himself, which would have allegedly occurred in Oregon in September or October of 2005 and in Long Beach, Washington on May 27-29, 2006. The Second Amended Information filed in this case (CP 26) established through Counts 1 through 6 sexual activity of an ongoing nature between the defendant and the named complaining child beginning in approximately September, 2003 and running through to December, 2006.

The court was cognizant of the information concerning lustful disposition towards this child and instructed the jury as part of the jury instructions given to the jury (CP 117). Instruction No. 6 reads as follows:

INSTRUCTION NO. 6

Evidence has been introduced in this case on the subject of sexual contact with the alleged victim occurring outside of Clark County, Washington and for an event occurring prior to any of the charging counts for the limited purpose of arguing the defendant's prior lustful disposition towards the alleged victim.

You must not consider this evidence for any other purpose.

-(Court's Instructions to the Jury, CP117, Instruction No. 6)

The defendant, in his brief, argues that the court should have balanced this evidence against its prejudicial impact on the jury. The trial court indicated that, "historically activity that is as to the – between the same parties the jurisdiction – jurisdictional boundaries of lustful disposition is generally not applied, so I'll – I'll permit." (RP 33, L 10-14).

Our Supreme Court has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100

Wn.2d 131, 133-134, 667 P.2d 68 (1983); State v. Medcalf, 58 Wn. App. 817, 822-823, 795 P.2d 158 (1990).

Examples of this are all consistent with the use of this evidence to show lustful disposition. In State v. Kilgore, 147 Wn.2d 288, 290-291, 295, 53 P.3d 974 (2002) the Appellate Court decision was affirmed that evidence of lustful disposition by the defendant molesting his step-niece five or six times, touching the step-niece's genitals with his hands and penis three times and touched the brother-in-law on other occasions was admissible. In Ray, 116 Wn.2d at 548, evidence was allowed admitting evidence of father's uncharged three instances of prior attempts at sexual contact with his daughter. In State v. Guzman, 119 Wn. App. 176, 184, 79 P.3d 990 (2003) it was held that evidence that the defendant had previously touched the ten year old victim's breasts was "highly probative" to show lustful disposition.

The defendant in our case has claimed that the court needs to hold some type of evidentiary hearings. But as discussed in Kilgore, 147 Wn.2d at 295, the Washington Supreme Court held that requiring an evidentiary hearing in every case where defendant contests a prior bad act would serve no useful purpose and cause unnecessary delay. The court indicated that it is the trial court that is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts

probably occurred. The decision on whether or not to conduct a full evidentiary hearing is left to the trial court's sound discretion.

In our situation both the prosecution and defense represented to the court that sexual improprieties were alleged to have occurred outside of the jurisdictional boundaries of Clark County. Some of the activities dealing in Pacific County and others dealing in Portland, Oregon. (RP 30-33). This conduct was then testified to by the child at the time of her testimony and, as previously noted, the trial court limited the way that the jury could use this information. This evidence has been previously deemed probative of the crime charged, not unduly prejudicial warranting reversal. Ray, 116 Wn.2d at 547; Guzman, 119 Wn. App. at 182; Kilgore, 147 Wn.2d at 292; State v. Pirtel, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

The State submits that the trial court did not abuse its discretion in allowing this limited evidence of lustful disposition to come before the jury.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the Appellant deals with the jury instruction that was given by the court relating to the law that a child's testimony in a sex case need not be corroborated. The claim is that this instruction unfairly emphasized the testimony of the complainant and

thus was an improper comment on the evidence, misleading, and confusing without further explanation of technical terms. And further that it operated to subvert the presumption of innocence and relieved the State of its burden of proof.

This specific instruction is found in the Court's Instructions to the Jury (CP 117) as Instruction No. 7. It reads as follows:

INSTRUCTION NO. 7

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

-(Court's Instructions to the Jury, CP117, Instruction No. 7)

The Appellate Court reviews de novo alleged errors of law in Jury Instructions. Del Rosario v. Del Rosario, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Del Rosario, 152 Wn.2d at 382.

The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case. (Washington Constitution, Article 4 § 16). But an instruction that states the law correctly and is pertinent to the issues raised in a case does not constitute a comment on the evidence. State v. Johnson, 29 Wn. App. 807, 811, 631

P.2d 413 (1981); State v. Zimmerman, 130 Wn. App. 170, 181, 121 P.3d 1216 (2005); State v. Ciskie, 110 Wn.2d 263, 282-284, 751 P.2d 1165 (1988).

RCW 9A.44.020(1) provides: “In order to convict a person of any crime defined in Chapter 9A.44 RCW, Sex Offenses, it shall not be necessary that the testimony of the alleged victim be corroborated.”

An impermissible comment conveys a judge’s personal attitude towards the merits of a case or permits the jury to infer from what the judge said or did not say, that the judge believed or disbelieved questioned testimony. Ciskie, 110 Wn.2d at 283; Hamilton v. Department of Labor and Industries, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). However, as pointed out in the Zimmerman case and the Ciskie case (in particular), the providing of the proper jury instruction is not a comment by the judge, nor does it convey his personal attitude toward the evidence or lack of evidence. It does not suggest that the court believes more weight should be given to the alleged victim’s testimony. It merely mirrors the accurate statement of the law. The giving of the instruction of the type given in our case has been found by the Washington Supreme Court to be a correct statement of the law and that it does not constitute reversible error. State v. Malone, 20 Wn. App. 712, 582 P.2d 883 (1978); State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949).

This has recently been spelled out again in Division II of the Court of Appeals in State v. Zimmerman, 130 Wn. App. 170, 121 P.3d 1216 (2005). This matter was accepted for review by the State Supreme Court and went to the State Supreme Court where it was remanded back to Division II to reconsider a separate issue in the appeal. State v. Zimmerman, 157 Wn.2d 1012, 138 P.3d 113 (2006). This matter was then re-reviewed by Division II in State v. Zimmerman, 135 Wn. App. 970, 146 P.3d 1224 (2006). Division II reaffirmed their position. All of this particular appellate action did not address the question of the jury instruction that Division II had previously ruled on. The issue that was raised in the Supreme Court and back on review in Division II dealt with putting the age of the child by date of birth in the jury instructions.

Thus, in the Zimmerman case at 130 Wn. App. 170, the question came up of the corroboration instruction. Zimmerman maintained that the trial court committed reversible error by instructing the jury, over his objection, that the testimony of the alleged child molestation victim need not be corroborated. Division II disagreed with this.

Division II first points out that an instruction that accurately states the applicable law is not a comment on the evidence and cites to State v. Ciskie, 110 Wn.2d 263. The instruction that had been provided in

Zimmerman mirrored RCW 9A.44.020(1) and thus was an accurate statement of the law. Zimmerman, 130 Wn. App. at 181.

The Zimmerman court noted:

The trial court here stated that it was giving the instruction, over Zimmerman's objection, based on State v. Malone, 20 Wn. App. 712, 582 P.2d 883 (1978), review denied, 91 Wn.2d 1018 (1979). In Malone, a defendant contended that his rape conviction should be reversed because the trial court instructed the jury that "in order to convict the defendant of the crime of rape in any degree, it shall not be necessary that the testimony of the alleged victim be corroborated". 20 Wn. App. at 714. Division I ruled that the instruction was a correct statement of the law and was pertinent to the issues presented at the trial. It also found that the phrasing of the instruction did not convey an opinion on the alleged victim's credibility. The court therefore concluded that it was not a comment on the evidence. Malone, 20 Wn. App. at 714-715.

The Washington Supreme Court in State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949), also held that such an instruction was not an improper comment on the evidence. The instruction challenged in Clayton provided: "You are instructed that it is the law of this state that a person charged with attempting to carnally know a female child under the age of 18 years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act." 32 Wn.2d at 572. The Supreme Court held that the trial court expressed no opinion as to the truth or falsity of the testimony of the alleged victim or as to the weight that the court attached to her testimony, but properly submitted the questions involving credibility and weight of the evidence to the jury. Clayton, 32 Wn.2d at 573-574.

Zimmerman argues that this court should reject Malone because it has been overruled on other grounds and has not been cited for the proposition relevant here. But even if this were a valid argument, it does not address the precedent in Clayton. Once the Washington Supreme Court has decided an issue of State law, its conclusion is binding on the lower courts. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Accordingly, we follow Clayton and Malone and hold that the instruction correctly stated the law and was not an improper comment on the evidence.

-(Zimmerman, 130 Wn. App. at 181-182)

The State submits that there has been no showing that the trial court improperly instructed the jury, or that the jury inferred from that instruction that it was a comment by the court addressing the alleged victim's testimony. Nothing has been demonstrated in this record to show that the victim's testimony was entitled to greater weight and that this somehow was argued or presented by the State with the use of this particular instruction. It is an accurate statement of the law in the State of Washington and as such is not objectionable.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error is a claim of ineffective assistance of counsel dealing with a claim of conflict between the defense attorney and his client. Also part of this claim is that the trial court failed to hold any

type of evidentiary hearing to determine the nature of the conflict of interest.

To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. In re the Personal Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

This right includes the entitlement to representation that is free from conflicts of interest. State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003); Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed.2d 220 (1981).

The trial court has a duty to investigate potential attorney/client conflicts of interest if it knows or reasonably should know that a potential conflict exists. Mickens v. Taylor, 535 U.S. 162, 167-172, 122 S. Ct. 1237, 152 L. Ed.2d 291 (2002); Cuyler v. Sullivan, 446 U.S. 335, 100 S.

Ct. 1708, 64 L. Ed.2d 333 (1980). Reversal of a conviction is required if a defendant or his attorney makes a timely objection to a claimed conflict and the trial court fails to conduct an adequate inquiry. Holloway v. Arkansas, 435 U.S. 475, 488, 98 S. Ct. 1173, 55 L. Ed.2d 426 (1978). But if the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance. Cuyler, 446 U.S. at 350; Wood, 450 U.S. at 272-274.

An actual conflict is a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties. United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001). An attorney has an actual as opposed to a potential conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material fact or legal issue or to a course of action. Dhaliwal, 150 Wn.2d at 559. In order to show this adverse affect, the defendant need not demonstrate prejudice – that the outcome of his trial would have been different but for the conflict – but only that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. Thus, the conflict must cause some lapse in representation contrary to the defendant's interests or

have likely affected particular aspects of counsel's advocacy on behalf of the defendant. State v. Robinson, 79 Wn. App. 386, 395, 902 P.2d 652 (1995).

In our situation, the court was advised by the attorneys that the defense attorney had represented the complaining witness's mother in a juvenile matter approximately 20 years earlier. It is obvious from the discussion with the court that he had not remembered this representation, but once he was reminded of it, he immediately let the court know about it. At that point then, the attorneys discussed the matter with the mother of the child and determined that she had no problem with a possible violation of attorney/client privilege. At no time did the defense alert the court of any type of problems or disputes between the defense attorney and his current client nor was there any representation made, at any time, that the conflict prevented the attorney from doing an adequate job of cross-examining the complaining witness's mother.

THE COURT: Alright. I'm informed in chambers that Mr. Buckley at one time represented Mary Liddle at a time when she was a juvenile and that that obviously did not come to his attention or being something over 20 years ago, was not aware of it and no one was aware of it until it came up during the lunch hour.

Ms. Liddle, Mr. Farr has informed me that you're waiving – I mean, he's examined you and cross-examined you, nothing at all was dealt with your past and that you're waiving insofar as the – his examination of you, which

would be basically in violation of the attorney/client privileges under our rules. You understand that?

MRS. LIDDLE: Yes, I do.

THE COURT: So you're waiving it.

MRS. LIDDLE: Correct.

-(RP 268, L3-19)

There has been no showing of an inherent conflict or splitting of loyalties or interests between the mother of the complaining witness and the defendant. Nor was any plausible alternative defense strategy or tactic even mentioned in the Appellant's brief. The only thing that is rather amazing is a claim by the defense attorney on appeal that, "it is evident from the record that the defense counsel did not aggressively or affectively cross-examine his former client. (RP 88-110)". (Brief of Appellant, Page 38). The State would ask the Court of Appeals to review this cross-examination of the complaining witness's mother. The State submits that it was quite adequate cross-examination. He was obtaining the information that he felt was necessary to defend his client. Further, there was nothing about the woman's background that would lead to any type of inherent conflict anyway. The areas that had been touched on in direct examination and the areas that the defense wished to develop for purposes of its

defense strategy were part of the questioning and procedure used by the defense attorney in questioning this witness.

Likewise, the State maintains that there was the hearing as requested by the parties when the potential conflict came to light. The parties had an opportunity then to develop this and brought it to the court's attention. After discussing it in chambers with the court, they put on the record what they felt was necessary for their purposes. Their purposes being the preservation of the record by both the State and the defense and a clear indication that there was no potential difficulty of conflict with the complaining witness's mother. It is true that there was no discussion with the defendant, however, the defendant has never raised this at any time during the trial or subsequent to it other than this matter on appeal. Further, there has been absolutely no indication that there was a conflict between the tactics and strategies used by this defense attorney on behalf of his client. No alternative course of conduct has even remotely been demonstrated or discussed. As indicated previously in the case law, reversal of a conviction is required if a defendant or his attorney makes a timely objection to a claimed conflict (that was not done in this case) and the trial court fails to conduct an adequate inquiry.

The State maintains that the trial court did conduct the adequate inquiry that was requested by the parties and to help resolve any issues or

problems that may have arisen. There has been no showing of a lapse in representation contrary to the defendant's interests, nor has there been any showing that this matter likely affected particular aspects of the counsel's advocacy on behalf of the defendant.

V. RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR

The defense has filed a supplemental brief raising an additional assignment of error. The claim is that there is insufficient evidence to support Count 7 of the Information. The Amended Information (CP 17) charged as Count 7 Delivery of a Narcotic While Over 18 or a Non-Narcotic From Schedule I – V to Someone Under 18 and 3 Years Junior as codified in RCW 69.50.406(b) and the alleged dates of activity from September 12, 2004 to December 16, 2006.

The court gave the jury its instructions (CP 117) and as part of Instruction No. 21 were the elements of Count 7. The elements as set forth in Count 7 were as follows:

- (1) That between September 12, 2004 and December 16, 2006, the defendant delivered a controlled substance to K.M.L., a person under 18 years of age and 3 years his junior;
- (2) That the defendant knew that the substance delivered was a controlled substance;
- (3) That the defendant is over 18 years of age; and

(4) That the acts occurred in the State of Washington.

-(Court's Instructions to the Jury, CP117,
Part of Instruction No. 21)

Evidence is sufficient to support a conviction if, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Greene, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). When a defendant challenges the sufficiency of evidence in a criminal case, the appellate court draws all reasonable inferences from the evidence in favor of the State and interprets all reasonable inferences from the evidence strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn there from. The appellate court also defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

The claim of insufficiency in this case is a representation by the defendant that the elements of the crime are based solely upon the testimony of the complaining witness. The appellant goes on to indicate

that the record contains no evidence corroborating her claim that the defendant provided marijuana or smoked it with her at any time. To the contrary, several witnesses were called by the defense who testified that they never saw the defendant smoke marijuana.

In our case the complaining witness indicated that she smoked marijuana a lot and that she started when she was approximately 13 years old. (RP 200). She indicated that she smoked marijuana from at least the ages of 13 to 16 years, or up until December, 2006. She indicated that sometimes the marijuana that she used she obtained from the defendant. (RP 201). The relative ages of the parties had previously been discussed and testified to with the defendant clearly being over the age of 18 and the complaining witness being a juvenile at the time of the alleged activities.

She recalls that she was about 14 years old when he gave it to her and the first time they smoked it in a pipe. (RP 202). She further indicated that she knows what marijuana is. She knows how it smells and the effects that it has on her. (RP 202-203). She further testified that he gave it to her practically every time he saw her and that they usually smoked it together in a bong or a pipe. (RP 203-204). She further was able to give details about when and where they smoked and that sometimes this led to sexual activity between them. (RP 205-207).

On cross-examination, the complaining witness was asked extensively about her knowledge of marijuana and her story about obtaining it from and smoking it with the defendant. She indicated that she first got her marijuana from the defendant and went on to describe the history of smoking of this with the defendant. (RP 232-237).

The defendant testified on his own behalf and indicated that he had found out that the complaining witness had been using marijuana and that he had complained to her parents about that. (RP 351). He also further indicated that he smoked marijuana. (RP 352). He also indicated to the jury that he had seen the complaining witness smoking marijuana with others on previous occasions. (RP 353).

The State submits that there has been a sufficient showing to meet the elements of the crime for purposes of this question going to a jury. The complaining witness discussed with the jury that she is aware of marijuana, aware of its effect, its smell. That she usually obtained the controlled substance from the defendant and that on many occasions this type of behavior also led to some type of sexual misconduct perpetrated on her by the defendant. At no time during the questioning was there any attempt to show, by the defense, that she did not know what marijuana was or that she could not identify accurately the controlled substance. In

fact, they wanted to show that she was in fact a marijuana user but that she was using it with her friends and that she obtained it elsewhere.

Nor can there be any question about whether or not the defendant was aware of marijuana because he admitted to the jury that he smoked marijuana. Therefore, if he was supplying this to the complaining witness, it is obvious that he was supplying to her the controlled substance that he was aware of and knew that in fact it was marijuana.

The complaining witness was able to provide a long and detailed history of the use of controlled substance with the defendant. She was able to adequately describe how it is ingested and the type of effects it would have on her. Further, there was never any attempt to show that she was mistaken or that she did not understand or know the nature of the illicit substance. This is part of a trial tactic or strategy used by this particular defendant.

The State submits that there has been an adequate showing of the essential elements of the crime to allow this question to go to a trier of fact for determination of guilt or innocence.

VI. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 12 day of June, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
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COURT OF APPEALS
DIVISION II

09 JAN 16 2009 07

STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

CARL GREGORY WILLIAMS,
Appellant.

No. 37450-1-II

Clark Co. No. 07-1-00326-6

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Jan 13, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

| | | |
|-----|---|---|
| TO: | David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454 | Steven W. Thayer Attorney at Law 514 W. 9 th Street Vancouver, WA 98660 |
| | Carl Gregory Williams DOC# 312782 Washington Corrections Center PO Box 900 Shelton, WA 98584 | |

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Jennifer Casey
Date: Jan 13, 2009.
Place: Vancouver, Washington.