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NO. 65147-1-I

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

REC'D
FEB 23 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

EZEQUIEL APOLO-ALBINO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jay White, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Does the State's brief improperly conflate the appellant's issues on appeal with claims raised in Apolo's motion for a new trial?

2. Does footnote 17 of the State's brief misstate the record relating to Danko's purported "strategy" in failing to cross-examine and call certain witnesses?

3. Was evidence of the complainants' bias, which Danko failed to discover due to his incompetence, necessary to establish a viable defense?

B. ARGUMENTS IN REPLY

1. THE STATE'S BRIEF CONFLATES THE ARGUMENTS ON APPEAL WITH THOSE SET FORTH IN REPLACEMENT COUNSEL TODD'S MOTION FOR A NEW TRIAL.

The State's brief confuses Apolo's arguments on appeal with those raised by replacement counsel Brian Todd in his motion for a new trial. Brief of Respondent (BOR) at 16 (appearing to characterize claims raised on motion for new trial as Apolo's claims on appeal). However, this Court should reject the State's attempt to frame the appellant's argument in this manner.¹

¹ Interestingly, in addressing Apolo's claim that replacement counsel was ineffective, the State takes pains to separate Apolo's claims on appeal from those raised by replacement counsel. BOR at 38-39.

As discussed in Apolo's opening brief, the trial court appointed replacement counsel to represent Apolo on a motion for a new trial after the conflict between Danko and Apolo became clear. Replacement counsel argued that Danko (1) was ineffective for failing to object to prior acts of molestation against the complaining witnesses and (2) failed to investigate the case. CP 46. Replacement counsel relied on affidavits as well as limited testimony, but he did not order trial transcripts and seemed at times unfamiliar with what occurred at trial. 12RP 2-6, 16-17; CP 48-49.

Despite the State's eagerness to topple straw men, Apolo does not repeat replacement counsel's first claim on appeal because trial record does not support it (a fact replacement counsel might have known had he reviewed the record before making his arguments). Cf. BOR at 20-22 (argument addressing claims not raised on appeal).

As for the second claim, Apolo now argues the trial court applied the law incorrectly and based its ruling on facts not supported by the evidence, and that, in any event, replacement counsel was ineffective for presenting the court with incomplete and inaccurate information on the issues. Brief of Appellant (BOA) at 23-24, 27-31. Apolo also raises ineffective assistance claims not ruled on by the trial court, including that counsel's ineffectiveness led to his failure to discover information

supporting the complainants' bias. BOA at 6, 27-31. This Court should reject the State's attempt to characterize Apolo's current claims as identical to those raised on the motion for a new trial.

2. FOOTNOTE 17 OF RESPONDENT'S BRIEF INACCURATELY REPRESENTS DANKO'S STATEMENTS ABOUT THE "STRATEGY" HE EMPLOYED.

The State argues Danko's failure to cross-examine the complainants regarding variations in their stories was sound trial strategy. Footnote 17 of the State's brief appears to suggest Danko informed the court that discrepancies in the complainants' statements were "few," thereby explaining his failure to call investigator Hearon regarding the girls' out-of-court statements. BOR at 19 n. 17 (citing CP 61; 7RP 22).

Rather, Danko represented that the discrepancies in the girls' stories were crucial to the defense. As discussed in the appellant's opening brief,² Danko argued Hearon should be permitted to testify about the comparison chart that she compiled outlining important inconsistencies between defense and State interviews, regardless of whether such information was before the jury. 7RP 18, 22-24, 26. Danko claimed the jury needed to know the girls had changed their stories. 7RP 23. He pleaded with the court that he had been counting on Hearon's testimony to

² BOA at 16-17.

make his case. 7RP 27. He acknowledged, however, he had no legal support for his argument. 7RP 28.

The trial court ruled that even though Danko failed to confront the complaining witnesses, Hearon would be permitted to point out differences between the defense interviews and statements made at trial and in the interview DVD. 7RP 29-30, 32-33, 35-36. But Danko did not call Hearon to testify. According to Hearon's affidavit, she suspected that Danko downplayed at that point the alterations in the girls' stories because he was not sure what, precisely, the girls' testimony had been. CP 61. This is consistent with Danko's frequent self-contradiction, outlined in detail in the "Statement of the Case" found in appellant's opening brief. However, Apolo is unaware of any statements by Danko acknowledging the discrepancies were "few," as footnote 17 suggests.

3. THIS COURT SHOULD REJECT THE STATE'S
ASSERTION THAT EVIDENCE OF THE
COMPLAINANTS' BIAS WAS INSIGNIFICANT TO
THE DEFENSE.

This Court should likewise reject the State's claim that evidence regarding the girls' bias would have been insignificant to the defense given the testimony at trial. BOR at 30-32. While jury heard evidence that the girls were uncomfortable around their father, the potential evidence (D.G.'s eagerness to separate from Apolo and be adopted by

“Jeff” because the girls considered 60-year-old Apolo too old and strict) would have established a concrete reason for fabrication otherwise missing from the defense case. CP 53-54; BOA at 6, 29-30. Worse, in arguing against Apolo’s claim, the State appears to conflate evidence of bias with the allegations themselves, seemingly arguing that if the allegations were true the girls would have a reason to wish to live elsewhere. BOR at 31. This argument makes no sense. Evidence of their bias, however, would have provided the jury a viable explanation for the allegations.

The State also appears to suggest that language in the appellant’s brief that Danko “chose to ignore” evidence of bias serves as some sort of concession that Danko’s failure to investigate was tactical. BOR at 30-32 (citing BOA at 30). Nothing could be further from the truth. What Danko “chose” to do was to (1) act in a nonsensical manner by ignoring Kitching, who could have provided helpful information, (2) misrepresent to Kitching that Apolo prohibited Danko from communicating with him, and (3) later make bizarre and contradictory claims to the court regarding Kitching’s connection with Apolo. BOA at 6-7, 19-20, 30-31. This court should reject the State’s facile assertion.

C. CONCLUSION

For the reasons stated above and in the appellant's opening brief, this Court should reverse Apolo's convictions based on Danko's pervasively ineffective assistance.

DATED this 23rd day of February, 2011.

Respectfully submitted,

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