

NO. 66039-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALLEN JACK FROST,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
FILED  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD MCDERMOTT

BRIEF OF RESPONDENT

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**A. ISSUES PRESENTED**

1. To establish ineffective assistance of counsel, Frost must first show that counsel's representation was deficient. A psychological evaluation of a rape victim will be ordered only for compelling reasons. There was no evidence that the victim here suffered any mental disability at the time of the rape or at the time of trial. The trial court concluded that there was no compelling reason justifying such an order. Was failure to seek a compelled psychological evaluation deficient performance?

2. To establish ineffective assistance of counsel, Frost must first show that counsel's representation was deficient. Legitimate trial strategy cannot be deficient performance. Frost's therapist observed the victim during counseling corollary to Frost's therapy, which included therapy for marital issues. Was it a legitimate trial strategy, and thus not deficient performance, for counsel to decide not to call the therapist as a witness, in order to avoid injecting evidence into this rape trial that Frost's marriage was troubled?

3. To establish ineffective assistance of counsel, Frost must first show that counsel's representation was deficient. Defense counsel must conduct a reasonable investigation but is not required to conduct an exhaustive investigation or pursue an investigation

that would be fruitless. The defense investigation was thorough and produced extensive material that was used at trial to attack the victim's credibility. There was no evidence that the victim suffered any mental disability at the time of the rape or at the time of trial. Was consultation with a mental health expert necessary to a reasonable investigation?

4. To establish ineffective assistance of counsel, Frost must establish a substantial probability that but for counsel's errors, the result of trial would have been different. The expert opinion Frost identifies as lacking at trial would not have been admissible. The events that Frost's therapist personally observed were of very minor significance. Frost was convicted after a bench trial. The trial court concluded that the additional evidence proffered post-trial did not change its opinion that Frost was guilty of rape. Has Frost failed to establish a substantial probability of prejudice caused by trial counsel's strategy?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Allen Jack Frost, with rape in the third degree, contrary to RCW 9A.44.060(1)(a).<sup>1</sup> CP 1. The State alleged that Frost raped BLC<sup>2</sup> in January of 2008, in her room in the basement of Frost's home. CP 1-5. BLC was at the time the intimate partner of Frost's stepson. CP 2.

Frost was tried in King County Superior Court, the Honorable Richard McDermott presiding. 1RP 1-2.<sup>3</sup> Frost waived his right to a jury. CP 39. The judge found Frost guilty as charged on February 8, 2010. CP 158; 15RP 2-7. The court entered findings of fact and conclusions of law pursuant to CrR 6.1. CP 158-62. The court denied a motion for new trial that was based on claims of ineffective assistance of counsel. CP 425-27.

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<sup>1</sup> "(1) A person is guilty of rape in the third degree when ... such person engages in sexual intercourse with another person, not married to the perpetrator: (a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct." RCW 9A.44.060(1).

<sup>2</sup> The victim and her daughter will be referred to using their initials in an effort to protect their privacy.

<sup>3</sup> The verbatim report of proceedings will be referred to in this brief as follows: 1RP-1/7/10; 2RP-1/11/10; 3RP-1/12/10; 4RP-1/13/10 volume of reporter Erwin; 5RP- 1/13/10 volume of reporter Chatelain; 6RP-1/14/10; 7RP-1/19/10; 8RP-1/20/10; 9RP-1/25/10; 10RP-1/26/10; 11RP-1/27/10 volume of reporter Erwin; 12RP-1/27/10 volume of reporter O'Donnell; 13RP-1/28/10; 14RP-2/1/10; 15RP-2/8/10; 16RP-8/26/10; 17RP-9/1/10.

The court imposed a standard range sentence of six months of confinement, converting 30 days to community restitution. CP 428-37.

## **2. SUBSTANTIVE FACTS**

On January 6, 2008, defendant Frost forcibly raped his stepson's girlfriend, BLC, in her bed. 5RP 8-16; 11RP 6-9. BLC resisted, struggling to push Frost away, but Frost was able to force her to engage in sexual intercourse against her will. 5RP 8-16. That assault was the basis of the charge of rape in the third degree.

BLC was 18 years old when the rape occurred. 4RP 8. She had been involved in a dating relationship with Frost's stepson Logan C<sup>4</sup> for two years prior to the rape. 4RP 11-13; 11RP 6, 8. BLC and Logan began living together in mid-2006. 4RP 19-21; 11RP 9. Together they had a daughter, KC, born in July of 2007. 4RP 28.

By January of 2008, both BLC and Logan were addicted to heroin. 4RP 31-38; 11RP 19-21. They were living with their infant

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<sup>4</sup> The State here uses only the last name initial of Frost's stepson, the father of BLC's child, in an effort to protect the child's privacy. For the same reason, he will be referred to by his first name throughout the brief. No disrespect is intended.

daughter in the basement of the home of defendant Jack Frost and his wife, Carol Frost. 5RP 3-4.

On January 5, 2008, Logan and BLC were arrested outside a bank, in connection with a forged check on one of the Frosts' bank accounts. 5RP 3-5; 9RP 38-41. Police officers found heroin and drug paraphernalia in Logan and BLC's car and Logan stated that the heroin was his. 5RP 5-6; 11RP 29-31. Instead of being booked into jail, Logan was permitted to enter inpatient drug treatment that night. 5RP 5-6; 9RP 44.

When Logan entered treatment, BLC had no heroin and she began to suffer withdrawal symptoms. 5RP 7. The next day, January 6, BLC was still in withdrawal. 5RP 7. BLC was resting on her bed when Frost came downstairs and forced her to engage in repeated acts of sexual intercourse against her will. 5RP 8-16. No one else (except the infant KC) was in the house at the time. 5RP 8. Frost testified that he was in BLC's bedroom with her that day while no one else was in the house, but claimed that he simply observed her illness and confronted her about her drug use, and that no sexual intercourse occurred. 11RP 95-99.

Frost told BLC that she would not tell anyone about the rape, because she was a drug addict and no one would believe her. 5RP

16. Frost threatened to reveal BLC's drug use to BLC's family if she told anyone about the rape. 5RP 16. BLC was afraid that she would lose her daughter if she reported the rape, so she told no one about it. 5RP 17. Beginning the next day, Frost began to give cash to BLC, which she often used to buy drugs. 5RP 18-22. BLC understood that Frost gave her the money so that she would remain silent about the rape. 5RP 19.

BLC finally disclosed the rape on January 27, 2009, during a confidential intake assessment for a drug treatment program. 5RP 64-66; 8RP 14-15, 19-20. Days later, BLC was admitted into an inpatient detoxification program in Tacoma, followed immediately by a 28-day inpatient rehabilitation program in Selah. 3RP 75; 8RP 20-21. BLC completed inpatient treatment on March 2, 2009, and reported the rape to King County Police on March 3. 4RP 48; 8RP 82-82; Ex. 44.

After the rape was reported to police, Frost called the intake counselor to whom the initial report was made and told her that the money that he was spending on an attorney to defend the charge instead could be put in trust for KC or BLC's education. 8RP 25. BLC was still obtaining services from that organization at the time of the call. 8RP 27-29.

After BLC's disclosure of the rape to the intake counselor and her admission to inpatient treatment, both the Coles (BLC's parents) and the Frosts tried to get court-ordered third party custody of KC. 4RP 54; 9RP 86; 13RP 60-62. Hearings occurred in family court during 2009. 3RP 90; 7RP 15. By the time of the criminal trial, BLC was maintaining sobriety and had custody of KC and custody proceedings were ongoing. 3RP 91; 4RP 55; 9RP 96.

Defense counsel attacked BLC's credibility on cross-examination by getting BLC to admit that she stole and routinely lied in connection with her drug addiction (7RP 12-13, 74), and by emphasizing multiple specific falsehoods and thefts that BLC admitted (6RP 14; 7RP 15, 45-46, 72, 84), the check forgeries as to which she admitted being involved (7RP 6-9), her significant exaggeration of her grades in ninth grade, when she left school (6RP 16-19), and her irresponsible use of heroin while she was caring for children (6RP 46-47; 7RP 12-13). Defense witnesses described check thefts by BLC, check forgeries, alleged unauthorized ATM withdrawals by BLC, BLC's alleged thefts of cash and personal items from the Frosts, BLC's use of the proceeds of thefts committed by others, and other irresponsible behavior. 9RP 21, 25, 34, 38-43, 72-76, 89-90; 11RP 9-10, 21-22,

26-27, 29-31, 42, 47-50, 54-55; 12RP 5-9, 23, 29-31; 13RP 11-17, 46-51, 84-85, 12. Frost testified that BLC misled him about her drug use, successfully concealing her use of heroin for long periods of time. 13RP 107-13, 115-22.

### **3. MOTION FOR NEW TRIAL**

On February 17, 2010, with new counsel, Frost filed a motion for a new trial and requested an extension of time to present that motion. CP 62-63. The court granted that extension of time. CP 66-67. The memorandum in support of the motion for a new trial, filed July 21, 2010, alleged that trial counsel provided ineffective assistance. CP 248-65.

On July 12, 2010, Frost filed a motion for discovery of all mental health records of the victim, BLC, and for a mental health examination of BLC. CP 164, 168. The motion was opposed by the State and by BLC. CP 322. The trial court denied the motion, finding that "no evidence was elicited [at trial] to support the theory that the victim was psychologically unstable during the relevant time period," and that Frost had not established a compelling reason to justify such an invasive examination. CP 322-23.

The trial court denied the motion for a new trial on August 26, 2010. 16RP 25-31. It entered written findings denying the motion for new trial on September 1, 2010. CP 425-27. The court found that trial counsel's performance was not deficient and even if it had been, the matters raised in the motion would not have likely changed the outcome of the proceeding. 16RP 27, 30-31; CP 426.

**4. DECLARATIONS OF FROST'S THERAPIST,  
DR. KEVIN CONNOLLY**

Frost's claims of ineffective assistance of counsel rely upon letters and a declaration written by Dr. Kevin Connolly, Frost's counselor. CP 219. Frost and his wife, Carol Frost, were treated by Connolly for several years for marital issues, among other things. CP 230. At some point, the Frosts asked Connolly to see BLC and Logan "as a favor" and Connolly did so. CP 234.

The documents at issue include four letters submitted in relation to the custody proceedings in family court in 2009:

(1) The letter dated February 26, 2009: In this letter Connolly opines that the Frosts have good motives for seeking custody of KC, not diminished by their own personal and marital issues. CP 230.

(2) An undated letter, apparently second in the sequence:

In this letter, Connolly implores the court to grant custody of KC to the Frosts. CP 232. He states, "I would personally be more comfortable if the parents [BLC and Logan] were thanking the Frosts for stepping up while they were using, rather than accusing them of vicious crimes." CP 232.

(3) An undated letter, apparently signed March 29, 2009: In this letter, Connolly specifically address the allegation of rape. He states that "no one" mentioned a sexual assault to him, despite "plenty of opportunity." CP 234. Connolly notes other doubts that he has about BLC's motives and credibility. CP 234.

(4) An undated letter, apparently signed July 7, 2009: In this letter, Connolly notes that he has a release from Logan but not from BLC, so he "feels able" to state that the central issue he addressed with both of them was addiction. CP 239. Connolly states that when he saw Frost and BLC interact, he saw none of the usual signs of an abusive relationship. CP 239. Connolly states that Frost and Carol Frost "certainly have there [sic] own issues." CP 239. He also states that he believes the court should hold it against BLC if she will not sign a release. CP 239.

The final document is a declaration by Connolly, prepared for the motion for a new trial on the rape charge, signed July 13, 2010, five months after this trial. In it, Connolly says that BLC and Logan saw him as collateral visits to the Frosts' therapy. CP 219. Information that appears for the first time in this declaration is that Connolly had heard that BLC reported that she had been diagnosed with bipolar disorder. CP 220. He states that this type of mood disorder can go hand-in-hand with a personality disorder and that people with one such possible personality disorder can be manipulative and pathological liars. CP 220-21. Connolly states that BLC leaving her infant daughter with Frost after the alleged rape could be consistent with a "psychopathic slip" in her report of events. CP 221.

**C. ARGUMENT**

**1. FROST HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Frost argues that his trial counsel was ineffective for failing to present Dr. Connolly or another mental health expert to testify to BLC's credibility and for failing to consult a mental health expert in preparation for trial. Both of these arguments are without merit. The decision not to call Dr. Connolly or another expert was a

legitimate tactical decision and was not deficient performance of counsel. Frost has not established that consultation with a mental health expert was necessary to challenge BLC's credibility, or that it would have produced any relevant evidence. As to both claims, Frost has not established that the decisions caused substantial prejudice.

To establish ineffective assistance of counsel, Frost must show both that defense counsel's representation was deficient; i.e., that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. The United States Supreme Court has warned that, "[i]t is all too tempting for a

defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id. at 689.

In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Courts should recognize that, in any given case, effective assistance of counsel could be

provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689. Counsel is not required to conduct an exhaustive investigation or to call all possible witnesses. In re Pers. Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998).

The Strickland standard must be applied with "scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity" of the adversary process. Harrington v. Richter, 562 U.S. \_\_\_, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689-90). The representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 131 S. Ct. at 788.

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

In this case, Frost has established neither deficient performance nor prejudice.

- a. The Decision Not To Present Frost's Counselor Or Another Mental Health Expert Was A Reasonable Trial Strategy.

There are three types of evidence that Frost argues should have been presented at trial: a psychological evaluation of BLC; expert opinion that it is possible that BLC suffered a personality disorder that could make her a convincing liar; and psychologist Connolly's own interactions with BLC. Frost could not have presented evidence in the first category because it was not available, and could not have presented evidence in the second category because that opinion was unknown to counsel before trial and was irrelevant and inadmissible. As the trial court concluded, defense counsel's decision not to call Dr. Connolly as a witness was a matter of legitimate trial tactics. CP 426; 16RP 28-31.

Generally, the decision whether to call a particular witness is one on which reasonable opinions may differ, and it is therefore presumed to be a matter within the realm of legitimate trial tactics. In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). That presumption may be overcome by showing that counsel failed to

properly investigate what defenses were available, failed to adequately prepare for trial, or failed to subpoena necessary witnesses. Id.; see State v. Jury, 19 Wn. App. 253, 263, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978) (counsel deficient where he made virtually no factual investigation, did not adequately interview witnesses, did not subpoena witnesses, and did not inform the court of the substance of the witnesses' testimony); State v. Byrd, 30 Wn. App. 794, 799-800, 638 P.2d 601 (1981) (counsel would be deficient if he failed to interview and present key witness on consent issue in rape case).

The claim that trial counsel here should have sought a psychological examination of BLC is refuted by the unavailability of such an examination in this case. A motion for production of mental health records of BLC and to compel a psychological examination of BLC was brought as part of the post-trial proceedings in the trial court. CP 163-171. That motion was denied. CP 322-23.

A witness or victim of a crime will not be ordered to submit to a psychological examination unless the defendant demonstrates a compelling reason to do so. State v. Israel, 91 Wn. App. 846, 850, 963 P.2d 897, rev. denied, 136 Wn.2d 1029 (1998). In affirming that rule, the Supreme Court has explained, "to conclude otherwise would

smack of our countenancing a practice of placing victims and witnesses on trial in place of defendants." State v. Hoffman, 116 Wn.2d 51, 89, 804 P.2d 577 (1991).

The Supreme Court's early adoption of the rule was in a case similar to this one, a sexual assault case in which the defendant argued that a psychological examination of the victim could provide information relevant to "credibility and perceptual ability." State v. Demos, 94 Wn.2d 733, 738, 619 P.2d 968 (1980). The Court held that there must be a compelling reason in order to justify requiring the victim to undergo a possibly traumatic examination when traditional, less intrusive means are available to assess credibility. Id.

The trial court properly denied the motion for a mental examination of BLC. The trial court made the following relevant written findings:

2. In order to grant this motion, the court would have to find a compelling reason to justify subjecting the victim to a[n] invasive mental health examination.
3. At trial, the victim was examined at great length for approximately three days, and many witnesses testified about the victim (including defense witnesses who personally knew the victim as well as the defendant himself) on the Defendant's behalf, but no evidence was elicited to support the theory that the victim was psychologically unstable during the relevant time period.

4. The only relevant evidence presented was the victim's voluntary self-report regarding her mental health years before the relevant time period.
5. The Defendant's showing was inadequate, per the standard set out in *State v. Israel*, to justify compelling an examination of the victim, and
6. The Defendant's showing was inadequate to justify the discovery of the victim's confidential records ....

CP 322-23. The court's conclusions are supported by the record.

There is no basis upon which an evaluation (or discovery of the victim's counseling records) could have been ordered.

The evidence cited by Frost on appeal to justify an evaluation is limited to BLC's statement in a drug treatment intake interview in 2009 that she had been diagnosed with bipolar disorder. 8RP 38-39. There is no evidence regarding who made that diagnosis or the circumstances of the diagnosis. The form indicates only that BLC reported that a diagnosis of "depression and bi-polar" was made at Valley Medical Center when BLC was 13 years old and that BLC was never treated for any mental health problem. Ex. 41 at pp. 5-6. Defense counsel did not ask BLC about the purported diagnosis, but did bring out that detail in cross-examination of the intake counselor, putting the information before the court, but doing so in a manner so

that BLC did not have an opportunity to explain the circumstances.

8RP 38-39.

Connolly stated that he believes that bipolar disorder can be associated with personality disorders, and that persons with one of those disorders can be pathological liars. CP 220-21. However, that statement is included only in a declaration filed months after the trial and cannot be used to evaluate the reasonableness of defense counsel's actions at trial. It is relevant only to the likelihood that any deficient performance caused prejudice, and is discussed later in this brief in that context.

Connolly did not diagnose BLC as having any mental disorder. CP 220. According to Frost's statement in an e-mail attached to his motion for a new trial, Connolly did not believe that BLC had even bipolar disorder. CP 339.

There was no evidence from any witness at trial that BLC displayed any symptoms of a mental disorder.<sup>5</sup> Testimony in the defense case covered BLC's behavior from 2005 through 2009, and included four people who had lived with BLC for long periods of time (Frost, his wife Carol, Logan (BLC's intimate partner), and Jordyn

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<sup>5</sup> There also is no indication that the family court proceedings included any such evidence.

(Logan's sister)), as well as BLC's stepfather, and a social worker who had multiple contacts with BLC. See 9RP 8-119 and 10RP 3-28 (Carol Frost); 11RP 5-86 and 12RP 5-31 (Logan); 10RP 37-57 (Jordyn Frost); 14RP 4-37 (Brian Cole, stepfather); 10RP 63-84 (Jessica Chaney, social worker). Frost testified that BLC was a good mother and functioned very well when she was not using heroin, and functioned well even when she was using heroin. E.g., 11RP 99; 13RP 29-30, 78, 107, 111, 115.

As Frost acknowledges, this Court in Israel held that "expert testimony regarding the effect of a witness' mental disability on his or her credibility is only proper when that disability is clearly apparent and the witness' competency is a central issue in the case." Israel, 91 Wn. App. at 856. The competency of BLC has never been questioned. The opinion in Israel rejected a trial court ruling that allowed an expert to testify that a witness had signs of antisocial personality disorder, and to testify that that disorder affects credibility. Id. at 854-59. This Court concluded that testimony about a possible diagnosis of antisocial personality would not be helpful to the fact-finder, would produce a trial within a trial on that collateral matter, and might cause a fact-finder to surrender his or her own common sense

in weighing testimony. Israel, 91 Wn. App. at 856-57 (citing United States v. Barnard, 490 F.2d 907 (9<sup>th</sup> Cir. 1973)).

Frost contends that the reasoning of Israel is arguably out of date (although that case was decided in 1998) because it relied on reasoning in Barnard, and Barnard was decided before the adoption of the Federal Rules of Evidence. App. Br. at 17. He cites as authority only a law school working paper and provides no analysis indicating why the adoption of the Federal Rules of Evidence would change the Israel analysis. This Court in Israel noted that the Ninth Circuit endorsed both the reasoning and the result of Barnard after the adoption of the Federal Rules of Evidence. Israel, 91 Wn. App. at 857 n.29 (citing United States v. Awkard, 597 F.2d 667 (9<sup>th</sup> Cir. 1979)).

In any event, in analyzing the adequacy of trial counsel's representation, it cannot be deficient performance for counsel to rely on published opinions of the Court of Appeals and the Supreme Court. State v. Brown, 159 Wn. App. 366, 371-72, 245 P.3d 776, rev. denied, 171 Wn.2d 1025 (2011).

Because there was no basis for a psychological examination of BLC, and no evidence of any symptoms of a mental disorder at the time of the crime or at the time BLC testified, any expert

psychological testimony would be based on speculation. That is clear from Connolly's own post-trial declaration, which is premised on BLC's reference to a bipolar disorder diagnosis when she was 13 years old, and states that a mood disorder such as bipolar disorder "can go hand in hand with a personality disorder," naming two types of personality disorder. CP 220. Connolly then notes that people with one of those disorders (which someone who actually had a mood disorder might have) can be convincing liars. CP 221. While expert testimony may include opinions based on specialized knowledge within the experience of the witness, that testimony must be relevant to be admissible. ER 402, ER 702; State v. Atsbeha, 142 Wn.2d 904, 917-18, 16 P.3d 626 (2001). Given the entirely speculative nature of Connolly's declaration, it includes no evidence that would be probative of the issues at trial.

Finally, the decision not to present Connolly to testify as a fact witness regarding his observations of BLC was a legitimate tactical decision. Warner was aware of Connolly's therapist role and his participation in the family court proceedings. CP 333, 337; 7RP 48; 16RP 16-18, 27, 30. Frost cites three facts that Connolly would offer: that BLC did not report the rape to him; that BLC seemed comfortable in Frost's presence; and that Connolly

believed that the rape did not occur and that BLC may have been able to lie convincingly because she may have borderline personality disorder. App. Br. at 9-10. Only the first two observations were made prior to trial and while those observations might be minimally relevant, they had virtually no probative value.

As to the first, there were many people to whom BLC did not report the rape.<sup>6</sup> Connolly states that he saw BLC and Logan "as a favor" to the Frosts and collateral to therapy visits of the Frosts. CP 219, 234. There is no reason that BLC would be inclined to confide in her rapist's therapist, such that her failure to do so would make it more probable that the rape did not occur. After he was aware of the rape allegation, Connolly reports that he was "very clear" with BLC and Logan that they were lucky that the Frosts could help with KC. CP 234. In light of that attitude, articulated to BLC after BLC's allegation of rape had been disclosed, it is not surprising that Connolly did not inspire BLC's confidence.

As to the second observation, the interaction Connolly observed between Frost and BLC, the domestic violence dynamic and the presence of others during the interaction, which made the

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<sup>6</sup> Defense counsel did present the testimony of a CPS worker who specifically asked BLC about her relationship with Frost and to whom BLC did not report the rape. 10RP 64, 67, 72.

situation safe, makes the probative value of this observation de minimis.

In his post-trial declaration, Frost states that trial counsel told Frost that he did not want to call Connolly as a witness because counsel did not want to present evidence that would reflect badly on the Frosts' marriage. CP 347. In this declaration, Frost states that he explained to counsel that Connolly "would confirm that our marriage was strong." CP 347. However, one of Connolly's 2009 letters to the family court confirms exactly the opposite: that the Frosts were seeing Connolly about "marital issues." CP 230. In another letter, Connolly stated that Frost and Carol Frost "certainly have [their] own issues." CP 239. In this rape case, it was a very reasonable tactical decision to avoid presenting evidence that the Frosts' marriage was troubled.

Further, it is clear that BLC never waived her psychologist-patient privilege,<sup>7</sup> so while Connolly wrote letters to the court about his observations and communication with BLC, his testimony about his observations and private communication with her would have

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<sup>7</sup> RCW 18.83.110. This lack of a waiver was noted by Connolly himself in a 2009 declaration, along with the statement that the refusal to sign a release should be held against BLC (CP 239). In addition, BLC objected to release of her records during the post-trial motion to obtain them. CP 322.

been objectionable at trial as violating that privilege. Defense counsel's decision not to inject Connolly into this trial was a reasonable tactical choice.

Finally, as to Connolly's speculation that BLC could convincingly lie about the rape because of a personality disorder, this theory was unavailable to defense counsel prior to trial and is not relevant to the issue of possible deficient performance.

There is no evidence that BLC had a mental condition that affected her ability to perceive events or retell them, or her ability to testify. Thus, there is no tenable basis for an order compelling a psychological examination or for the introduction of evidence about possible diagnoses that could apply, and the failure to do so cannot be deficient representation.

Moreover, Frost has not rebutted the presumption that trial counsel's decision not to call Connolly as a witness was tactical. Trial counsel's choice not to call Connolly, in order to avoid injecting evidence of the troubled state of Frost's marriage, was a reasonable tactic, particularly in light of the massive amount of other material available to attack BLC's credibility. The failure to call a mental health expert was not deficient representation under these circumstances.

b. The Decision Not To Consult With A Mental Health Expert Was Not Deficient Investigation.

When the allegation of ineffectiveness of counsel relates to failure to investigate, "a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments." In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). The attorney's actions or inaction is evaluated based on "what was known and reasonable at the time the attorney made his choices." Id. at 253. Counsel's decisions regarding Connolly's declarations were reasonable decisions.

From the perspective of defense counsel preparing a defense, there may be any number of hypothetical experts on a wide variety of subjects whose insight might possibly be useful. Richter, 101 S. Ct. at 789. Counsel is entitled to formulate a strategy that is reasonable at the time and expend limited resources in light of effective trial strategies. Id. "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." Id. at 789-90.

There is a strong presumption that counsel's attention to certain issues and not to others reflects trial tactics rather than simple neglect. Id. at 790. "It is difficult to establish ineffective assistance

when counsel's overall performance indicates active and capable advocacy." Id. at 791. Even in a capital case, counsel is not required to conduct an exhaustive investigation or to call every possible witness. Benn, 134 Wn.2d at 900. The standard is reasonableness. Id.

In Elmore, supra, the Washington Supreme Court rejected a claim that a capital defendant's attorneys were ineffective for failure to investigate his "mental deficiencies," including competence, before Elmore entered a guilty plea. 162 Wn.2d. at 252-54. In that case, Elmore was not evaluated by any mental health expert before the plea was entered, although counsel was aware that he had suffered head injuries, had been exposed to neurotoxins, and had suffered abuse at the hands of his father. Id. at 245-46, 253. The court noted that it was not a case where counsel did not perform any investigation. Id. at 253. The court also found it significant that there was no indication that Elmore was incompetent (or suffered from diminished capacity to form the mens rea required). Id.

Just as in Elmore, in this case counsel performed a thorough investigation and put on an extensive defense case. As the trial court found, there has been no evidence produced suggesting that BLC's mental health was compromised at the time of the rape or at the time

of trial. Consultation with mental health experts was unnecessary and so was not a necessary component of competent representation.

The defense investigation in this case was very thorough. Counsel was able to preview the State's case through the prior custody proceedings. It is clear that counsel did review the family court proceedings closely, as the defense attacked the victim's credibility by producing prior declarations and testimony from those proceedings. E.g., 6RP 32-35; 7RP 15, 26; see also 14RP 18 (use of Brian Cole's family court declaration). The defense also produced many other documents to undermine the victim's testimony and to corroborate defense witnesses. E.g., 6RP 14 (school application); 6RP 17-19 (high school records); 6RP 41-45 (agreements with Frosts); 7RP 6-9 (forged checks); 7RP 10-12 (confessional letter of BLC); 7RP 40-41 (picture of car BLC wrecked); 7RP 65-67 (checks BLC wrote on Frost's account); 7RP 71 (checkbook with check partially completed by BLC); 7RP 83 (DSHS application).

Defense counsel's cross-examination of the victim lasted more than a day. The defense theory was that BLC was a liar, a manipulator, and a bad mother, and those themes were thoroughly developed in cross-examination. 6RP 3-60; 7RP 6-88, 101-11.

The defense presented many additional witnesses to corroborate the defense theory, to expose the victim's lies in other contexts, and simply to make the victim look like a person of low moral character. 9RP 21, 25, 34, 38-43, 72-76, 89-90; 11RP 9-10, 21-22, 26-27, 29-31, 42, 47-50, 54-55; 12RP 5-9, 23, 29-31; 13RP 11-17, 46-51, 84-85, 12. The defense went to great lengths to present Brian Cole as a witness, to establish inconsistencies in statements of state's witnesses. 11RP 86-88; 14RP 8-18.

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), upon which Frost relies, was a capital case in which the claim was that counsel neglected the investigation of the defendant's background to determine whether mitigation evidence could be found. Id. at 519-34. The Court noted that in evaluating a defense investigation, a court must consider not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Id. at 527.

Defense counsel's decision not to request a mental evaluation of BLC was not unreasonable, as is illustrated by the trial court's refusal to grant such an evaluation in the course of the post-trial proceedings. CP 322-23. Even if counsel had been aware of Connolly's speculation about a personality disorder, expert testimony

about that possibility, unsupported by any evidence that BLC had a personality disorder, would be irrelevant and inadmissible, so consultation relating to that possibility would be simply wasted time. Counsel "has no duty to pursue strategies that reasonably appear unlikely to succeed." Brown, 159 Wn. App. at 371 (citing McFarland, 127 Wn.2d at 334 n.2).

Frost argues that defense counsel could have cross-examined the victim about her mental state or about her history of mental illness. App. Br. at 22-23. Aside from the victim's report during the intake assessment that she had been diagnosed with depression and bipolar disorder when she was 13 years old, there is no evidence that a qualified professional rendered a diagnosis, or the basis for it. BLC reported in the same interview that she had never had been treated for mental illness. Ex. 41 at p. 6.

The case upon which Frost relies was one in which defense counsel cross-examined the witness in a manner designed to show the witness' poor memory, and the issue on appeal was whether the State was properly allowed to call a psychiatrist to explain the nature of the mental disability of the witness, who displayed a visible, extremely nervous condition on the stand. State v. Froehlich, 96 Wn.2d 301, 304-06, 635 P.2d 127 (1981). The court concluded that

the expert testimony was properly admitted so that the jury would not be left in ignorance about the mental condition, where its symptoms were plainly observable. Id. at 306-08.

The only evidence that Frost identifies as establishing that BLC had a readily apparent mental disorder was that BLC told the intake counselor for a drug treatment program that she had been diagnosed with bipolar disorder years earlier. However, the testimony that Frost claims should have been offered relates to a symptom of a different mental disorder. The behavior that he indicates must be explained is BLC leaving her daughter with Frost - however, Connolly reasoned that this behavior indicated that BLC was a liar, not that she had a mental illness. CP 221, 234.

It is telling that there is no indication that Connolly observed any of BLC's testimony, or any of the testimony of the other witnesses at trial, including Frost himself. Connolly's speculation about BLC's demeanor on the stand is not the kind of expert explanation of an obvious mental disorder contemplated in Froehlich. Moreover, Connolly's suggestion of a personality disorder was not made before trial and could not have been a factor in determining the appropriate investigation. CP 219-22.

Frost has made no argument that a diagnosis of depression or bipolar disorder would be relevant - the evidence that he argues is relevant is the speculation that based on a diagnosis of a mood disorder such as bipolar disorder, BLC might have had a separate personality disorder, that could have made her skilled at deception. App. Br. at 8-9. Even if that theory had been available before trial, such speculation is irrelevant to the issues at trial and would not be the proper subject of cross-examination. Such cross-examination, even if permitted, would be pointless.

c. Frost Has Not Established Prejudice As A Result Of Trial Counsel's Strategy.

Frost also has not established the prejudice prong of his ineffective assistance claims. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Richter, 131 S.

Ct. at 792. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, Frost's ineffectiveness claim fails, even if the representation was deficient. See In re Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) .

Trial counsel's failure to call Connolly as a witness was an issue raised in Frost's motion for a new trial, supported by declarations, and litigated below. CP 252-56; 16RP 5, 16-18, 30-31. The trial court concluded:

2. The Court finds that defense counsel's performance was not deficient.
3. Issues raised by defense appear to have been properly considered by defense counsel and counsel's actions related to each issue appear to have been a result of tactical decisions.
4. Even if the issues [raised] by defense on this motion amounted to any deficiency, they would not have likely changed the outcome of the proceeding.

CP 426. The trial court observed that nothing raised in the motion for new trial that was relevant or admissible, and material, was not raised by trial counsel. 16RP 30.

Trial counsel's decision not to request a mental examination of the victim cannot be shown to be prejudicial because the trial judge denied that motion when it was made post-trial. CP 322-23.

As previously argued in this brief, Frost has not established the compelling reasons required before such an examination will be ordered. Hoffman, 116 Wn.2d at 89.

Connolly's opinion as to BLC's credibility would be inadmissible, so the failure to offer that evidence could not be prejudicial. Frost argues that "Dr. Connolly believed [BLC's] actions were inconsistent" with the report of the rape. App. Br. at 9. This assertion is based on Connolly's declarations, made months after this trial, which states that BLC's willingness to leave her infant daughter in Frost's care after the rape "could be consistent with what is called a 'psychopathic slip.'" CP 221. Connolly's conclusion is based on the convoluted reasoning that because no victim of rape would leave her child with the rapist, and BLC did leave her child with Frost, BLC must have lied about the rape; and because the court believed BLC's report of the rape, BLC must be an excellent liar and, therefore, must suffer from borderline personality disorder. CP 221. Essentially, Connolly's belief that the rape did not occur is offered as evidence that BLC may suffer from a personality disorder.

The premise of this line of reasoning is faulty. This was a crime of domestic violence<sup>8</sup> and it is well known that victims of domestic violence may remain with the perpetrator, in harm's way, even with their children, because of the special dynamics of domestic violence. E.g., State v. Ciskie, 110 Wn.2d 263, 271-80, 751 P.2d 1165 (1988). Connolly himself offered an alternative explanation that conveys his own bias: that BLC was showing "remarkably little concern for her child's welfare." CP 221. It is also entirely possible that BLC did not believe that her daughter was at risk, as at all relevant times the child was under the age of three and there is no evidence that Frost was a pedophile.

Notably, in a 2009 letter apparently filed in the custody proceedings, Connolly posed the rhetorical question: "Why give your baby to someone who commits sex crimes?" CP 234. However, in that letter he did not suggest that BLC might suffer from a personality disorder because she did so. CP 234. To the contrary, Connolly also

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<sup>8</sup> This crime is by definition domestic violence because Frost and BLC were members of the same household. In addition, trial testimony painted Frost as a father figure to BLC. 10RP 44, 47, 67. The controlling nature of the Frost's behavior is illustrated by an incident described by Carol Frost, in which, when BLC refused to raise the shades in her living area, Frost removed the shades. 10RP 25-27.

took the opportunity to voice the suspicion that BLC was making a false accusation in order to gain custody of her daughter. CP 234.

Possible testimony by Connolly as to his opinion that BLC could and did convincingly lie about the rape is on its face an inadmissible opinion as to the credibility of the victim. A witness may not offer a personal opinion as to the truthfulness of another witness or the guilt of the defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Rather, “[t]he constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)). Connolly himself also was an obviously biased witness, as his letters demonstrate, and he who would not serve the role of an objective observer. There is no scientific basis upon which a psychologist can determine whether a sexual assault occurred based solely on the statements of the alleged victim. State v. Carlson, 80 Wn. App. 116, 125-27, 906 P.2d 999 (1995).

Frost's reliance on cases permitting expert opinion testimony as to the reliability of eyewitness identification is misplaced. Those

cases do not hold that a witness may offer an opinion as to the credibility of another witness. They conclude that the way in which people observe, form memories, and recollect experience have been the subject of empirical research and may be matters that are not obvious to the ordinary juror, and so may be proper subjects for expert testimony. See, e.g., State v. Cheatam, 150 Wn.2d 626, 644-652, 81 P.3d 830 (2003); United States v. Brownlee, 454 F.3d 131, 141-44 (3<sup>rd</sup> Cir. 2006). The Washington Supreme Court has clearly stated that an eyewitness identification expert "has no legitimate role in assessing the credibility of a witness." Cheatam, 150 Wn.2d at 649 n.5.

The credibility of the victim in this case was thoroughly challenged. The trial court, which was the trier-of-fact, concluded that the additional evidence proffered did not change its opinion that Frost was guilty of rape--there has been no showing that a different result would have occurred in this case if counsel had instead relied on the tactics that Frost now argues were required.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Frost's conviction and sentence.

DATED this 31st day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Daniel Chasan, the attorney for the appellant, at 17228 Westside Highway, Vashon, WA 98070, containing a copy of the Brief of Respondent, in STATE V. ALLEN JACK FROST, Cause No. 66039-0-1, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

8/31/11

Date

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