NO. 47676-2-II

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

STATE OF WASHINGTON, Respondent

v.

SHANNON EDWARD MEYER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01859-2

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The State accepts Appellant's Statement of the Case.

I. The evidence is sufficient to sustain the conviction for attempted rape of a child in the first degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable

inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability." *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), *citing State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).

The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "'It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.'" *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993) (overruled in part on other grounds by *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998), (*quoting United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v.*

Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Meyer claims that the evidence is insufficient to sustain his conviction for attempted rape of a child in the first degree.[1] In support of his argument, however, Meyer simply argues that the trier of fact should not have found K.J.C. credible. There is no other way to read Meyer's argument. This case turned entirely on the credibility determination made by the trier of fact, as most child sex abuse cases do. To the extent Meyer complains that there was no corroborative evidence, corroboration is not required—for good reason. An adult defendant is typically the one who controls whether a witness is present for a crime against a child, not the child. Meyer also complains that there is no evidence of luring or grooming in this case. One is left to wonder why that matters. Not every case will have such evidence. Meyer didn't need to "lure" K.J.C. anywhere, and he didn't need to groom her in order to attempt to shove his penis into her mouth. This act was violent when done to a child. As Meyer

[1] Meyer also argues the evidence is insufficient to sustain his conviction for attempted rape of a child in the second degree. But Meyer is not under sentence for that charge. That conviction was vacated and dismissed. CP 13.

acknowledges that credibility determinations cannot be overturned on appeal, his insufficiency claim fails.

II. Meyer was not denied effective assistance of counsel.

Meyer's second assignment or error is a broad claim of ineffective assistance of counsel. However, Meyer received effective representation from his attorney.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It 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.

Strickland at 689.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the appellate court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, *review denied*, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Madison* at 763; *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). This court presumes that the failure to object

was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, "[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal." *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

"Criminal defendants are not guaranteed 'successful assistance of counsel.'" *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a "strategy ultimately proved unsuccessful is immaterial." *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to

the deficient performance prong of *Strickland*, "hindsight has no place in an ineffective assistance analysis." *Grier* at 43.

Assuming without conceding that the remarks of K.J.C. in the forensic interview could be considered a comment on Meyer's veracity, defense counsel's decision not to seek excision of the remark from the video of the forensic interview did not constitute ineffective assistance of counsel. First, this was a bench trial. Judge Clark is well aware of her duty to disregard inadmissible material in her consideration of whether the State proved beyond a reasonable doubt that Meyer was guilty. See *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002) (Judge in a bench trial is presumed to ignore inadmissible evidence in reaching her verdict). Second, it is axiomatic in a case like this that where the victim claims a sexual act occurred, and the defendant flatly denies it occurred, the victim believes the defendant is lying. Judge Clark would have understood this as well. Finally, nine year-old K.J.C. is not the type of witness whose opinion carries "a special aura of reliability," like a police officer. *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). She's a young child. It is inconceivable that her remark to the forensic interviewer is the thing that tipped the scales in favor of a guilty verdict by Judge Clark. Thus, Meyer cannot demonstrate a reasonable probability that but for counsel's decision

not to seek excision of this remark, Judge Clark would have acquitted him. This claim lacks merit.

Meyer next complains that his attorney's cross-examination of K.J.C. was not sufficiently aggressive or long, and asserts that a longer and more aggressive cross examination would, as a matter of reasonable probability, have resulted in his acquittal. This claim is meritless.

The decision on how to cross-examine a witness, including tone, duration, and content, is entirely tactical. *In re Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). In criticizing counsel's cross-examination, Meyer points to the many inconsistencies in K.J.C.'s account of what happened. In so doing, Meyer acknowledges that these inconsistencies were laid bare in the record, placed squarely in front of the trier of fact. What good, then, would a more vigorous cross-examination have done? Cross-examining a child is delicate business. Beating up on a child witness is unseemly and likely to be ineffective. If the child doesn't break or recant under withering cross-examination, it may serve to bolster her credibility rather than diminish it. Moreover, trial defense counsel who was actually in the courtroom observing K.J.C. testify was in the best position to determine what questions to ask her. Meyer has not shown deficient performance, nor has he shown that more aggressive questioning about inconsistencies that were already in the record would have resulted in his acquittal.

Finally, Meyer contends that his counsel's closing argument was not long enough. He offers little argument on this point, beyond noting that the argument only spanned four pages of the transcript. He argues his counsel did not sufficiently attack K.J.C.'s credibility. The record belies this claim. Trial counsel argued that K.J.C.'s statements and testimony were unreliable; he argued that K.J.C. was confused and had fragmented thinking; he pointed out her numerous inconsistent statements; he argued that his client had a lack of opportunity to commit the crime. RP 410-413. Counsel deftly avoided personally attacking the child or characterizing her as a liar. Rather, given her tender age, he argued that she was confused and unreliable. Counsel did not fail to mount a defense for his client, as Meyer now claims. That Judge Clark was nevertheless persuaded of Meyer's guilt does not call into question trial counsel's performance. Meyer's claim of ineffective assistance of counsel lacks merit.

III. The State agrees to striking the chemical dependency evaluation and treatment.

The State has reviewed the sentencing hearing in the matter and agrees with Meyer that chemical dependency was not discussed and no record was made of why this was ordered. This should be stricken in an order amending the judgment and sentence.

CONCLUSION

Judgment should be affirmed. The sentencing condition relating to chemical dependency evaluation and treatment should be stricken and an order amending the judgment and sentence should be entered.

DATED this 17th day of March, 2016.

Respectfully submitted:

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