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SUPREME COURT NO. 99152-9

NO. 80298-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSÉ LUIS VÁZQUEZ SANTOS,

Petitioner.

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

The Honorable Patrick Oishi, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner José Luis Vázquez Santos (Vázquez) seeks review of the Court of Appeals' unpublished decision in State v. Vázquez-Santos, filed September 28, 2020 ("Op."), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Following a delayed disclosure, the petitioner was charged with two counts of molesting his stepdaughter several years earlier. At trial, defense counsel prevented him from testifying by (1) failing to notify him he could choose to testify even if counsel advised against it, and (2) misleadingly informing him that counsel would present the information the petitioner wished to testify about. Did the petitioner receive ineffective assistance of counsel, denying him a fair trial?

2. Did counsel also provide ineffective assistance by opening the door to prejudicial information that bolstered the complainant's credibility and the State's case?

C. STATEMENT OF THE CASE

1. **Vázquez is accused**

Petitioner Vázquez's stepdaughter A.V. was in her late 20s when she accused him of molesting her. She said it started when she was six years old and ended when she was in her late teens. CP 1-3, 5. The last time Vázquez touched her, when she was 19, the act culminated in sexual

intercourse. CP 5; RP 498. A.V. mentioned the matter to her mother and older brother on one occasion when she was seven or eight, but no one followed up. RP 498. After that, A.V. did not tell them again until 2011. She did not contact the police until 2016. RP 504-05.

2. **Charges**

Following A.V.'s report to police, Vázquez was charged with two counts: first degree child molestation occurring between November 26, 1996 and November 25, 2001, A.V.'s twelfth birthday; and second degree child molestation, occurring between November 26, 2001, and November 25, 2003, when A.V. turned 14. CP 1.

3. **Opening of door in opening statement**

The case proceeded to trial. In the State's opening statement, the prosecutor asserted the evidence would show Vázquez inappropriately touched his stepdaughter throughout her childhood. Then, the last time he touched her, the act culminated in rape. RP 370, 372.

In the defense opening statement, counsel highlighted A.V.'s questionable credibility and the poor investigation by the police, who failed to pursue corroborative leads. RP 375-78. Defense counsel emphasized that the only corroboration came from A.V.'s family members. RP 376. But, summarizing the charges, counsel stated:

> My client is charged with child molestation in the first degree for a time intervening 1996 and 2001, and Count [2], child molestation in the second degree, 2001 to 2003. He is not charged with rape, the incident that [A.V.] reported to the detective. *For whatever reason, the State has not charged that.*
>
> So the question here at the end of the case is whether you can conclude beyond a reasonable doubt that the State has met its burden, it has done everything it needs to do to persuade you, to convince you, that it has overcome the presumption of innocence. And I will submit at the end of the case they have not. Thank you.

RP 378 (emphasis added).

As trial progressed, the prosecutor announced he might call a witness to rebut the assertion in opening that the State's failure to charge rape was significant. RP 603 (asserting defense counsel had argued "for some reason" rape was not charged). The prosecutor pointed out that, for example, the statute of limitations on third degree rape prevented the State from charging Vázquez. RP 604. Defense counsel indicated he would not reference the matter in closing. RP 606. The trial court said it would allow such testimony absent stipulation. RP 609.

After the State's case, the trial court read the following stipulation:

> Defense counsel mentioned in opening statement that the State did not charge the defendant with rape for whatever reason. The parties now stipulate and agree that the State was legally prevented by the statute of limitations from charging the defendant with any crimes of a sexual nature alleged to have occurred after [A.V.] turned 15 years old. And that completes the statement or agreement.

RP 660.

4. Trial testimony, stipulation, and verdicts

A.V. was 29 years old at the time of trial. RP 476. A.V., her mother Kasha, and brother Victor moved to Seattle from San Francisco in the mid-1990s. RP 480, 621. They lived in an apartment near the Ballard Bridge. RP 480. A.V.'s mother started dating Vázquez soon after. RP 482, 623. Kasha and Vázquez married. RP 483. When A.V. was nine or 10, the family moved to a house off Southwest Roxbury Street near White Center. RP 484, 491, 585.

Vázquez would tuck A.V. in at night. Starting when she was six years old, he would reach under her covers and touch her vagina. RP 489. Sometimes his finger penetrated her vagina. RP 489, 492. A.V. didn't tell anyone until she was seven or eight years old. RP 490. She told her mother and brother that Vázquez touched her. RP 490. But A.V. used to play a game called "just kidding" in which she would say something outlandish and then say, "just kidding." RP 490, 530.

The touching continued several years after that. RP 490. Eventually Vázquez began performing oral sex on A.V. as well. RP 491, 493. The touching continued after A.V. began menstruating, which occurred when she was 11. RP 492-93.

A.V. testified Vázquez was overprotective and stifled her social life. RP 494, 523, 550-51. A.V. resented this. RP 526-27. Eventually she went to college in Spokane. RP 498, 525. A.V got a scholarship, but Vázquez helped her pay for room and board. RP 563-64.

A.V. returned from college during Christmas break and did not return. RP 498. She enrolled in community college. RP 498. Around Father's Day of 2009, Vázquez and A.V. went out for lunch. RP 498, 566. But they argued at lunch and on the way home. RP 498. A.V. told Vázquez she was leaving and went to her room to pack a bag. RP 500. But, according to A.V., "one thing led to another," and Vázquez ended up holding her down on the bed and penetrating her with his penis. RP 500, 568.

After that, A.V. left home and went to stay with Nancy, a friend from high school. RP 501, 555-56. A.V. stayed with Nancy for a few months but eventually returned home. RP 501-02.

A.V. didn't tell her mother or brother about Vázquez's actions until 2011. RP 502, 504. Once A.V. disclosed to mother Kasha, the two moved out of the Roxbury house. But A.V. declined to contact the police. RP 503-05, 636. A.V. did not contact the police because she "was trying to save money to find a place for me and my mom to stay." RP 504-05. A.V. could not explain how contacting the police after she moved out would have affected her ability to earn money or to find a place to stay. RP 505.

Kasha also testified. She did not return to the family residence immediately but spoke to Vázquez about a week later. RP 639. She told Vázquez why she left. Vasquez did not deny A.V.'s accusations. RP 639. A few months later, Kasha confronted Vázquez again. RP 639-40. He did not admit or deny having abused A.V. But he told Kasha that, as a child, he had been the victim of abuse by relatives. RP 640, 649, 658. Kasha and Vázquez eventually divorced. RP 636.

A.V. did not contact the police until 2016 after she saw Vázquez at the supermarket where she worked. RP 506.

The investigating detective also testified. He asked A.V. several times for Nancy's contact information, but A.V. never provided it. RP 405, 431-33, 447-48. He never sought video from the supermarket to verify A.V.'s claim about her interaction with Vázquez. RP 406-07, 430, 450.

A.V. acknowledged the detective asked for information about Nancy, and she agreed to provide it. RP 557. But she never took any steps to locate Nancy or relay any information. RP 557, 560.

After the State rested, Vázquez rested without calling any witnesses. RP 661. The jury convicted Vázquez as charged. CP 11-12.

5. **Robinson motion for new trial**

After the verdicts, Vázquez, represented by new counsel, moved for a new trial under State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999).

CP 51-55. Vázquez argued he did not understand it was his choice whether to testify. And, because he did not testify, important information had not been presented to the jury. Specifically, the jury was not informed that when A.V. was 19, Vázquez and A.V. conducted a consensual sexual relationship. A.V.'s accusations were the product of jealousy regarding Vázquez's relationship with his new wife. CP 60 (declaration statements 10, 14); CP 62.

Vázquez filed a supporting declaration setting forth the factual basis for his claim as follows: English was not Vázquez's first language; this hampered his understanding of trial—his first—and of his interactions with defense counsel. CP 60 (statements 1-7). Mid-trial, defense counsel and an associate visited Vázquez in jail. They discussed Vázquez's possible testimony, including that A.V. was accusing him due to jealousy. CP 60 (statements 8-10); CP 61 (statement 20). The associate, also a lawyer, told Vázquez he did not think it would be a good idea for Vázquez testify. Defense counsel seemed to agree. CP 60 (statements 11, 12). The associate told Vázquez he should not worry because defense counsel would "say everything" for Vázquez. CP 60 (statement 13). Vázquez thought defense counsel would tell the jury about A.V.'s jealousy. CP 60 (statement 14). Also, Vázquez had no recollection of being told he had the right to testify even if his lawyer thought it was a bad idea. CP 60 (statement 15).

During trial, Vázquez came to believe trial was not going well. He believed the jury needed to hear his testimony, and he told defense counsel he should testify about his theory of why A.V. was accusing him. CP 60-61 (statements 16-20). Vázquez declared that "[a]t trial, the judge asked if I was going to testify." CP 61 (statement 21). Further, "[m]y lawyer told me I was not going to testify." CP 61 (statement 22). "[My] lawyer then told the judge that I was not going to testify." CP 61 (statement 23). Vázquez did not say anything at that moment to counsel or to the court because he did not understand he had the right to testify. Moreover, he thought defense counsel would inform jurors regarding his theory about why A.V. was fabricating the allegations. CP 61 (statements 24, 25).

In support of the motion for new trial, Vázquez presented a declaration from original defense counsel stating that he typically informs clients that it is their decision "whether to plead guilty at arraignment, testify, or accept state's offer." CP 56. Vázquez wanted to testify but was advised against it after two separate meetings. CP 57. When the time came for the defense to present its case, or rest, counsel told Vázquez "I'm not going to have you testify" and then announced that the defense rested. CP 57. But defense counsel did not "remember telling [Vázquez] he could testify even if his lawyer, me, advised against it." CP 57.

The court ordered original defense counsel to submit to an interview. CP 37; RP 735, 751-53. The State submitted a response to Vázquez's motion, including the interview with defense counsel. CP 109-20; CP 38-50 (complete interview transcript).

In the interview, original defense counsel said he typically informs clients it is their choice whether to testify. CP 40-41. He was "confident" he had such a conversation with Vázquez. CP 41. But he could not recall any specific conversation. CP 41; see CP 49 ("I can't tell [you] the date and time, but I have no reason to think that he didn't have that information from me."). Original counsel believed Vázquez was concerned the jury wouldn't hear his side of the story, but counsel believed Vázquez agreed with counsel's strategy not to have Vázquez testify. CP 45, 48. When the State rested, defense counsel leaned toward Vázquez and told him "I'm not gonna have you testify." CP 46. There was no further conversation. Then, the defense rested. CP 46-47. Counsel's impression was Vázquez was following counsel's advice but knew it was his decision. CP 46-47.

After the documents were submitted, the trial court held a hearing on Vázquez's motion for a new trial. Vázquez argued his declaration set forth his claim of ineffective assistance with sufficient particularity that an evidentiary hearing was warranted under Robinson, 138 Wn.2d 753. RP 759. Vázquez also argued original counsel was ineffective under Robinson

because he failed to convey to Vázquez that he had the right to testify even despite counsel's advice. RP 761-72. Original counsel did not specifically recall telling Vázquez he had the "absolute" right to testify even over a lawyer's advice. RP 764-65. Further, original counsel misled Vázquez that he would present Vázquez's side of the story. RP 770-71.

The court, which reviewed the materials summarized above, ruled that Vázquez presented insufficient evidence to warrant an evidentiary hearing. RP 773-74. Puzzlingly, the court questioned the accuracy of Vázquez's declaration based on slight differences between (1) Vázquez's memory of the brief colloquy before the defense rested and (2) the recording of trial proceedings. RP 774 (appearing to discuss slight differences between CP 61, Vázquez declaration statements 21-23, and CP 46, interview transcript).

The court found, as for the first prong of the ineffectiveness test, that original counsel did not actually prevent Vázquez from testifying. RP 774-75. The court also thought Vázquez did not meet the prejudice prong for ineffectiveness. Vázquez's proffered testimony was unlikely to benefit the defense. His testimony may have opened the door to evidence—previously excluded —that when Vázquez had sex with A.V., Kasha was out of town for her father's funeral. The trial court believed the jury would not look favorably upon such evidence. RP 775-76.

6. **Appeal and decision**

Vázquez appealed, raising the issues identified above. In an unpublished opinion, the Court of Appeals denied each of his claims. He now asks that this Court grant review and reverse the Court of Appeals

D. REASONS REVIEW SHOULD BE ACCEPTED

1. **Review is appropriate under RAP 13.4(b)(3)**.

Review is appropriate under RAP 13.4(b)(3) because this case presents a significant constitutional question, the right to testify.

2. **Defense counsel prevented Vázquez from testifying, resulting in ineffective assistance of counsel.**

Vázquez was denied his right to testify. When the denial of such a right flows from the actions of trial counsel, it is evaluated as a claim of ineffective assistance of counsel.

An accused person has both state and federal constitutional rights to testify. Robinson, 138 Wn.2d at 758 (citing Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)). The right is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. Robinson, 138 Wn.2d at 758 (citing Rock, 483 U.S. at 51-52). Article I, section 22 of the Washington constitution also explicitly protects a defendant's right to testify. Robinson, 138 Wn.2d at 758 (citing State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)).

This right is fundamental and cannot be abrogated by defense counsel or the court. Robinson, 138 Wn.2d at 758 (citing Thomas, 128 Wn.2d at 558). The ultimate decision rests with the accused, and any waiver of the right to testify must be knowing, voluntary, and intelligent, although the trial court need not obtain such a waiver on the record. Robinson, 138 Wn.2d at 758-59 (citing Thomas, 128 Wn.2d at 558-59).

Counsel's interference with the right to testify may be established where counsel refuses to call the defendant as a witness despite the defendant's requests, where the attorney uses threats or coercion, or where the attorney flagrantly disregards the defendant's request to testify. Robinson, 138 Wn.2d at 762-63. Specifically, "attorneys who misinform the defendant of the consequences of taking the stand or make other misrepresentations to induce the defendant to remain silent also prevent their clients from testifying." Id. at 762. When this occurs, an accused is not required to immediately speak out, because requiring a defendant to object at trial against the wishes of counsel would unfairly "'assume[] a sophisticated defendant who is knowledgeable in both constitutional rights and criminal trial process.'" Robinson, 138 Wn.2d at 764 (citing Louis M. Holscher, The Legacy of *Rock v. Arkansas*: Protecting Criminal Defendants' Right to Testify in Their Own Behalf, 19 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 223, 264 (1993)).

This Court is applies the two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in evaluating such a claim. Robinson, 138 Wn.2d at 764-66, 770. Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22. Strickland, 466 U.S. at 685-86; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A person asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

This Court reviews claims of ineffective assistance de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109. Appellate courts also generally review de novo decisions of trial courts that were based on affidavits and other documentary evidence. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

Here, Vázquez offered more than bare assertions that counsel's actions undermined his right to testify under Robinson. The trial court therefore erred in denying Vázquez an evidentiary hearing on the matter.

A defendant who remains silent at trial about his right to testify may be entitled to an evidentiary hearing if he alleges that his lawyer actually prevented him from testifying. Robinson, 138 Wn.2d at 759 (citing Thomas, 128 Wn.2d 553; State v. King, 24 Wn. App. 495, 601 P.2d 982 (1979)). To warrant an evidentiary hearing, "[t]he defendant must . . . produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action." Robinson, 138 Wn.2d at 760.

"Defendants must show some 'particularity' to give their claims sufficient credibility to warrant further investigation." Robinson, 138 Wn.2d at 760 (quoting Underwood v. Clark, 939 F.2d 473, 476 (7th Cir.1991)). "The defendant must 'allege specific facts' and must be able to "demonstrate, from the record, that those specific factual allegations would be credible.'" Robinson, 138 Wn.2d at 760 (quoting Passos-Paternina v. United States, 12 F. Supp. 2d 231, 239 (D.P.R.1998) (internal quotations omitted)). Once a defendant meets this burden, he is entitled to an evidentiary hearing on the issue of whether he voluntarily waived the right to testify. Robinson, 138 Wn.2d at 760 (citing Thomas, 128 Wn.2d at 557).

Here, the declarations—which an appellate court reviews de novo for sufficiency—set forth sufficient facts to warrant an evidentiary hearing. Based on Vázquez's declaration and the interview submitted by the State,

counsel effectively prevented Vázquez from testifying by failing to inform him that he had he absolute right to testify even if counsel advised against it. Vázquez did not understand that he could testify even though counsel advised against it. CP 60 (Vázquez's statement 15). Admittedly, counsel stated that he always explains that whether to testify is the client's choice. But his interview is silent as to whether he explained that Vázquez retained that right, even if counsel advised against testifying. CP 40-41; see also CP 57 (counsel's initial declaration, stating that counsel did not "remember telling [Vázquez] he could testify even if [I] advised against it.").

Even worse, counsel effectively prevented Vázquez from taking the stand by reassuring Vázquez that the jury would hear his theory of the case even if he did not testify. CP 60-61 (undisputed declaration statements 13, 14, 25). Under Robinson, "attorneys who misinform the defendant of the consequences of taking the stand or make other misrepresentations to induce the defendant to remain silent also prevent their clients from testifying." Robinson, 138 Wn.2d at 762. Vázquez was an inexperienced criminal defendant and was unlikely to understand here was no other way for the jury to hear his theory that A.V. accused him based on their prior sexual relationship and her resulting jealousy of his new relationship.

In its oral ruling, the trial court discussed Vázquez's credibility. But the only portion of Vázquez's declaration with which the court took issue

dealt with the colloquy prior to the defense resting. RP 774. Even so, the recording (which Vázquez did not have the benefit of listening to) revealed only minor differences. Compare CP 61 (declaration statements 21-23) with CP 46-47 (discussion of audio recording in interview with counsel).

The slight discrepancy seized upon by the trial court is of little significance to Vázquez's underlying claims. Vázquez presented sufficient evidence to warrant an evidentiary hearing on whether he voluntarily waived his right to testify. Robinson, 138 Wn.2d at 760.

Here, even though the trial court failed to conduct an evidentiary hearing, Vázquez's declaration and defense counsel's interview, taken together, establish deficient performance under Robinson and Strickland.

To show prejudice under the second Strickland prong, Vázquez need not show that defense counsel's deficient performance more likely than not altered the outcome of the trial. Thomas, 109 Wn.2d at 226. To meet the prejudice prong, an accused must show a reasonable probability "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." McFarland, 127 Wn.2d at 337. The test for "reasonable probability" of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result. Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

Vázquez can show prejudice. If he had been permitted to testify, he could have offered a much-needed explanation for A.V.'s accusations. There is a reasonable probability Vázquez's explanation for A.V.'s change in attitude toward him would have swayed at least one juror in his favor.

The trial court's prejudice assessment, that Vázquez's testimony would not have helped his cause, is suspect. RP 775-76. It is possible his testimony would have opened the door to evidence that Kasha was away at her father's funeral at the time A.V. and Vázquez had an affair. And it is possible this would have led jurors to dislike Vázquez for personal reasons. But the question before the jury was not whether Vázquez was likeable. The jury was instructed to set personal feelings aside. CP 19. The question was, instead, whether there was any explanation for A.V.'s accusations. Without Vázquez's testimony, there was none. Vázquez's "choice" not to testify was no choice at all considering he was led to believe his side of the story would be presented to jurors. It never was.

A defendant who meets both prongs of the Strickland test is entitled to a new trial. Robinson, 138 Wn.2d at 769-70. Because the existing record shows that trial counsel's actions chilled Vázquez's right to testify on his own behalf, resulting in prejudice, his convictions should be reversed.

But, if this Court determines additional fact-finding is necessary, the case should be remanded for a hearing as set forth in Robinson to determine

whether counsel's actions effectively prevented Vázquez from testifying. Robinson, 138 Wn.2d at 770 (remanding for evidentiary hearing).

3. Counsel was also ineffective when he opened the door to information highlighting prejudicial uncharged conduct.

Defense counsel was also ineffective when, in his opening statement, he opened the door to information that the State did not charge Vázquez with additional sex crimes (including rape) only because the statute of limitations barred it. This information highlighted prejudicial uncharged conduct and bolstered A.V.'s credibility. Contrary to the Court of Appeals' analysis, reversal is required because there is a reasonable probability that counsel's unprofessional conduct prejudiced Vázquez.

The two-pronged test to establish ineffective assistance of counsel is set forth above. Only legitimate trial strategy or tactics constitute reasonable performance by counsel. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that counsel's conduct is reasonable is overcome where no conceivable legitimate tactic explains counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, there was no conceivable reason for defense counsel to suggest that the State was incompetent in failing to charge rape. Counsel, who is presumed to know the law, should have known there were legal

reasons for failing to charge that crime. Thus, the fact that rape was not charged was beneficial to the defense; the *reason* it was not charged was not. But counsel's statement that the State had not charged rape "for whatever reason" allowed the State to respond by introducing evidence that the State was *prohibited* from doing so. This highlighted A.V.'s allegation of rape, a serious uncharged crime. Counsel's argument also opened the door to information suggesting State would have charged the crime if it could, thereby bolstering A.V.'s credibility and the State's case. Cf. State v. Bourgeois, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997) (general rule is that a party cannot bolster a witness's testimony unless an opposing party has attacked that witness's credibility). The record shows the State would not have emphasized the uncharged crime in this manner but for counsel's ill-conceived attack. RP 603 (asking that such evidence to be admitted only after defense counsel raised the issue in opening statement).

As shown, there was no good reason to suggest the State was inattentive in failing to charge rape. Counsel's performance was deficient. And counsel's deficient performance was prejudicial. Counsel's misguided argument allowed the jury to hear evidence suggesting the State wanted to charge Vázquez with more crimes but could not. See RP 660 ("The parties now stipulate and agree that the State was legally prevented by the statute

of limitations from charging the defendant with any crimes of a sexual nature alleged to have occurred after [A.V.] turned 15 years old.").

The State's case had several weaknesses, including A.V.'s delayed reporting and her inexplicable refusal to help law enforcement locate Nancy, the single non-family witness with pertinent information. The stipulation—which suggested the State wished to charge Vázquez with additional crimes but could not—was likely to sway at least one juror in the State's favor. Wiggins, 539 U.S. at 537. Reversal is required on both counts.

E. CONCLUSION

This Court should accept review under RAP 13.4(b)(3) and reverse.

DATED this 26th day of October, 2020.

Respectfully submitted,

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APPENDIX

FILED
9/28/2020
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent,	No. 80298-4-I
v.	UNPUBLISHED OPINION
JOSE LUIS VAZQUEZ-SANTOS, Appellant.	

BOWMAN, J. — Jose Luis Vazquez-Santos appeals his jury convictions for one count of first degree and one count of second degree child molestation. He argues that the trial court erred in denying his motion for a new trial where his attorney interfered with his right to testify and that ineffective assistance of counsel and cumulative error prevented a fair trial. He also filed a statement of additional grounds asserting several claims of error. We affirm.

FACTS

The State charged Vazquez-Santos with one count of child molestation in the first degree and one count of child molestation in the second degree for repeatedly molesting his stepdaughter A.V. when she was between the age of 7 and 13 years old. A.V. did not report the abuse to the police until she was an

adult. A visit from Vazquez-Santos at her workplace after years of no contact with him triggered her report to law enforcement.

The case proceeded to jury trial in March 2019. Jury selection encompassed two days, during which Vazquez-Santos' attorney questioned 70 prospective jurors with him present. After jury selection, the State disclosed it would not offer at trial any of Vazquez-Santos' statements made to law enforcement at the time of his arrest. This included a statement by Vazquez-Santos about a consensual sexual relationship he claims he had with A.V. when she was 19 years old. The State also disclosed it would offer testimony about an uncharged sexual assault of A.V. as evidence of Vazquez-Santos' "lustful disposition" toward her. Defense counsel agreed that the evidence was admissible for that purpose.[1]

In its opening statement, the State described the uncharged sexual assault allegation as "touching turned to rape." In the defense opening statement, counsel clarified that Vazquez-Santos "is not charged with rape . . . . For whatever reason, the State has not charged that." During a recess, in response to counsel's remark, the prosecutor argued that the court should allow the State to call a filing deputy from the King County Prosecutor's Office to testify that the State could not have charged Vazquez-Santos with rape because the statute of limitations had expired. Defense counsel argued that no explanation

[1] "[E]vidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the [victim]." State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). " 'Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the [victim], which in turn makes it more probable that the defendant committed the offense charged.' " Ray, 116 Wn.2d at 547 (internal quotation marks omitted) (quoting State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68 (1983)).

was necessary but, after the trial court granted the State's request, agreed to a stipulated explanation instead of live testimony.

Before the State rested its case, defense counsel twice met with Vazquez-Santos about whether he should testify.[2] At the first meeting, defense counsel and another attorney conducted a mock direct-examination of Vazquez-Santos to explore the risks associated with his testimony. Both lawyers advised him against testifying. According to Vazquez-Santos, the attorney assisting defense counsel told him, "[Your attorney] will defend you, he will say everything for you." Vazquez-Santos did not make a final decision during the meeting about whether he would testify.

A few days later, defense counsel again consulted Vazquez-Santos about whether he should testify. Counsel repeated his opinion that Vazquez-Santos should not testify. Counsel later explained that a significant factor for his advice was concern that Vazquez-Santos' testimony could "open the door" to prejudicial statements he had made to law enforcement not offered in the State's case in chief. After the meeting, counsel believed that Vazquez-Santos planned to follow his advice not to testify.

On the morning of the final day of trial, the court asked defense counsel whether Vazquez-Santos would be testifying. Counsel told the court, "I do not anticipate my client testifying. I mean, I have, you know, obviously, something could change with this witness, but . . . I'm 99.9 percent confident and I shared

[2] Vazquez-Santos told his lawyer he wanted to testify to explain to the jury his suspicions that A.V. fabricated molestation allegations because she was jealous about his new marriage and family. Vazquez-Santos claimed that he broke off a consensual sexual relationship with A.V. to pursue a relationship with his new wife.

that with [the prosecutor] that I do not anticipate my client testifying or the defense putting on a case." Vazquez-Santos did not dispute his attorney's representations. After the State rested its case, the court looked to defense counsel for a final determination about whether the defense would present a case. Counsel told Vazquez-Santos, " 'I'm not going to have you testify' " and advised the court, "[T]he defense rests." Vazquez-Santos again said nothing.

The jury convicted Vazquez-Santos of both charges. Postconviction, Vazquez-Santos obtained new counsel and filed a motion for new trial. He alleged that his lawyer prevented him from testifying because counsel did not affirmatively advise him he could testify even if his lawyer advised against it[3] and that he was misled into believing the jury would hear the substance of his testimony even if he did not testify. He also argued that he lacked sufficient time at trial to tell the court that he wanted to testify.

Vazquez-Santos moved the court for an evidentiary hearing to determine whether defense counsel violated his right to testify. Instead, the court ordered that defense counsel and the attorney who assisted with Vazquez-Santos' mock examination submit to interviews with the State. At a subsequent hearing, the court reviewed declarations from Vazquez-Santos, trial counsel, and new defense counsel along with a transcript of trial counsel's interview by the State. After oral argument, the court declined to order an evidentiary hearing and

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[3] Vazquez-Santos also claimed in his declaration that he did not recall his lawyer telling him at all that he had the right to testify. But he did not raise that allegation in his motion for new trial.

denied Vazquez-Santos' motion for a new trial.[4] The judge sentenced Vazquez-Santos to a standard-range indeterminate sentence.

ANALYSIS

Vazquez-Santos argues the trial court erred in denying his motion for new trial because his lawyer violated his right to testify. He also contends his attorney performed deficiently by "opening the door" to prejudicial information. Finally, Vazquez-Santos contends cumulative error denied him a fair trial. We address each contention in turn.

Motion for New Trial

Vazquez-Santos argues that the trial court should have granted his motion for a new trial because his attorney violated his right to testify. A trial court may grant a motion for a new trial when "substantial justice has not been done" and "it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a)(8). The denial of a new trial is a matter mainly within the discretion of the trial court. State v. McKenzie, 157 Wn.2d 44, 51, 134 P.3d 221, 225 (2006). We review denial of a new trial for abuse of discretion. McKenzie, 157 Wn.2d at 51. An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. McKenzie, 157 Wn.2d at 52.

Both federal and state law guarantee the right of criminal defendants to testify. Rock v. Arkansas, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); State v. Lee, 12 Wn. App. 2d 378, 387, 460 P.3d 701, review denied, ___

[4] It does not appear that either the State or Vazquez-Santos interviewed the attorney who assisted in Vazquez-Santos' mock examination. In any event, neither party provided a transcript of an interview.

Wn.2d ___, 468 P.3d 622 (2020). Federally, the defendant's right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Rock, 483 U.S. at 51-52. Article I, section 22 of the Washington Constitution also protects a criminal defendant's right to testify. Only the defendant has the authority to decide whether to testify and any waiver of the right must be a voluntary decision made by the defendant. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). "The conduct of not taking the stand may be interpreted as a valid waiver of the right to testify." Thomas, 128 Wn.2d at 559.

Violations of the right to testify can include an actual refusal by counsel to allow a defendant to testify in the face of an unequivocal demand, coercive acts by counsel compelling a defendant to waive the right to testify, or misrepresentations about the consequences of testifying to induce silence. State v. Robinson, 138 Wn.2d 753, 762, 982 P.2d 590 (1999). But counsel does not prevent a defendant from testifying by "merely advis[ing] [him] against testifying as a matter of trial tactics." State v. King, 24 Wn. App. 495, 499, 601 P.2d 982 (1979).

Allegations that defense counsel violated a defendant's right to testify are treated as claims of ineffective assistance of counsel, subject to the two-prong test of Strickland v. Washington, 467 U.S. 1267, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). Robinson, 138 Wn.2d at 766. Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim. Strickland, 466 U.S. at 687; State v. Jones, 183

Wn.2d 327, 339, 352 P.3d 776 (2015). Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that "but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Strickland, 466 U.S. at 694; State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

"[T]he defendant must present substantial, factual evidence" that his right to testify was violated "in order to merit an evidentiary hearing or other action." Thomas, 128 Wn.2d at 561. "Mere allegations" that a defendant's right to testify has been violated are insufficient to warrant a hearing. Robinson, 138 Wn.2d at 760. Instead, criminal defendants must set forth "specific facts" supporting their claims that are verifiable in the record. Robinson, 138 Wn.2d at 760.

Vazquez-Santos argues the trial court should have held an evidentiary hearing to determine if his attorney violated his right to testify. He contends he "offered more than bare assertions that counsel's actions undermined his right to testify under Robinson." We disagree. In Robinson, the defendant claimed his lawyer refused his demand to testify because the lawyer was personally frustrated by trial court rulings and did not want to participate further in the case. Robinson, 138 Wn.2d at 757. In support of his claim, Robinson produced affidavits from a jail transportation officer and another attorney who witnessed the confrontation between him and counsel. Robinson, 138 Wn.2d at 760. Robinson's lawyer also acknowledged Robinson " 'pleaded with' " him to testify,

yet he refused to call Robinson as a witness because he " 'only wanted to get this case done with.' " Robinson, 138 Wn.2d at 757. Our Supreme Court found this to be sufficient corroboration entitling Robinson to an evidentiary hearing. Robinson, 138 Wn.2d at 760-61.

Here, Vazquez-Santos alleges his attorney violated his right to counsel because he misrepresented his right to testify by omission. That is, he did not specifically advise Vazquez-Santos he "had the absolute right to testify even if counsel warned against it." Vazquez-Santos cites no authority requiring such a specific advisement.[5] Defense counsel was " 'confident' " he told Vazquez-Santos it was his choice whether to testify. " 'Unaccompanied by coercion, legal advice concerning [the] exercise of the right to testify infringes no right, but simply discharges defense counsel's ethical responsibility to the accused.' " Robinson, 138 Wn.2d at 763-64[6] (quoting Lema v. United States, 987 F.2d 48, 52 (1st Cir. 1993)).

Vazquez-Santos also argues that the attorney who assisted defense counsel during the mock direct-examination misled him into believing his attorney would tell the jury the substance of his testimony as an alternative to testifying. He claims the attorney told him, "[D]on't worry, [your attorney] will defend you, he will say everything for you." Vazquez-Santos' allegation is uncorroborated by the record. Additionally, the statement at issue is vague and does not support

[5] When a party fails to cite to relevant authority, we generally presume that the party found none. Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wn. App. 344, 353, 71 P.3d 233 (2003).

[6] Alteration in original.

Vazquez-Santos' contention that the attorney promised that "the jury would hear his theory of the case even if he did not testify."

Finally, Vazquez-Santos provides no evidence that he made an unequivocal demand to his attorney or the court that he wanted to testify. Vazquez-Santos contends he had no chance to tell the court he wanted to testify because when it was time to make a decision, his lawyer told him, " 'I'm not going to have you testify[,]' and then announced that the defense rested." Vazquez-Santos' claim is not supported by the record. Before testimony on the final day of trial, Vazquez-Santos' attorney told the court he was "99.9 percent confident" no testimony from the defense would be forthcoming. Vazquez-Santos had ample time then to raise any disagreement he may have had about his lawyer's representation. He also had a chance to demand to testify at the close of the State's case. Without an "unequivocal demand[ ]" by a defendant that he be allowed to testify, "we will presume that the defendant elected not to take the stand upon the advice of counsel." Robinson, 138 Wn.2d at 765. Vazquez-Santos' allegations that his lawyer prevented him from testifying did not merit an evidentiary hearing and the trial court did not abuse its discretion in denying his motion for a new trial.[7]

[7] Vazquez-Santos also argues that "[e]ven without an evidentiary hearing, the declaration and interview establish" his claim. "If a defendant is able to prove by a preponderance of the evidence that his attorney actually prevented him from testifying, he will have established that the waiver of his constitutional right to testify was not knowing and voluntary." Robinson, 138 Wn.2d at 764-65. For the reasons discussed above, Vazquez-Santos fails to meet his burden.

Ineffective Assistance of Counsel

Vazquez-Santos argues his attorney was ineffective at trial because he "opened the door to information that . . . highlighted prejudicial uncharged conduct" in his opening statement.

A successful ineffective assistance of counsel claim requires both deficient performance and a showing of prejudice. Strickland, 466 U.S. at 687. We need not "address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697. As discussed, to establish prejudice, a 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." Strickland, 466 U.S. at 694. In making this determination, we must consider the totality of the evidence before the jury. Strickland, 466 U.S. at 695.

Vazquez-Santos points to defense counsel's statement during opening remarks that "[f]or whatever reason," the State did not charge Vazquez-Santos with rape, which led to an instruction from the court that the statute of limitations legally prevented the State from charging him. The court told the jury that "this is an agreed statement of the parties":

> Defense counsel mentioned in opening statement that the State did not charge the defendant with rape for whatever reason. The parties now stipulate and agree that the State was legally prevented by the statute of limitations from charging the defendant with any crimes of a sexual nature alleged to have occurred after [A.V.] turned 15 years old.

Vazquez-Santos argues that the stipulation prejudice him because it "highlighted prejudicial uncharged conduct and bolstered the complainant's credibility." But the parties agreed that the rape allegation was admissible to show Vazquez-Santos' "lustful disposition" toward A.V. no matter if the State was legally able to charge him for the crime. Also, the jury knew that A.V. delayed reporting the rape for many years. Any prejudice from learning that the crime's statute of limitations had expired was low.

Nor did the instruction bolster A.V.'s credibility. The State offered the allegation of rape as evidence of Vazquez-Santos' "lustful disposition" toward A.V. That the State found the allegation to be credible was readily apparent to the jury. Vazquez-Santos does not establish that there is a reasonable probability that, but for counsel's error, the result of the trial would have been different. His attorney was not ineffective.

Cumulative Error

Vazquez-Santos asserts that cumulative error entitles him to a new trial. Cumulative error "is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). As discussed above, Vazquez-Santos establishes no error.

Statement of Additional Grounds

Vazquez-Santos filed a statement of additional grounds raising several claims of error. First, he argues that the court should have appointed an

interpreter to assist him during the trial. But Vazquez-Santos did not request an interpreter and it is not apparent from the record that an interpreter was necessary. The record includes trial transcripts as well as the case scheduling order and a time-for-trial waiver written in English and signed by Vazquez-Santos. A trial court does not have an affirmative obligation to appoint an interpreter for a defendant where that defendant's lack of fluency or facility in the language is not apparent. State v. Mendez, 56 Wn. App. 458, 462-63, 784 P.2d 168 (1989).

Vazquez-Santos also complains that jury selection was rushed and that "[w]hen the jury was chosen, it was the lawyer . . . who picked them. He never took my opinion into account." Although the Rules of Appellate Procedure do not require a criminal defendant to include citation to the record or legal authority in a statement of additional grounds, under RAP 10.10(c), "the appellate court will not consider [the argument] if it does not inform the court of the nature and occurrence of [the] alleged errors." Vazquez-Santos does not sufficiently explain his claim so we do not consider it.

Vazquez-Santos next contends the trial court refused to accept or consider multiple letters of support from his friends and family. Again, the record does not support his claim. To the contrary, defense counsel filed the letters of support with the court as attachments to the presentence memorandum and the judge acknowledged the letters at sentencing.

Finally, Vazquez-Santos claims that the lifetime no-contact order issued by the trial court at sentencing was too broad because it does not "let me see my

children." But the judgment and sentence provides only that Vazquez-Santos is permanently restricted from contact with minors "without supervision of a responsible adult who has knowledge of this conviction." And the trial court noted that Vazquez-Santos' current wife is a responsible adult who "has knowledge of this conviction" and can supervise visits with his children.

We review the imposition of crime-related prohibitions for an abuse of discretion. In re Pers. Restraint Petition of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). Trial courts may impose "crime-related prohibitions" while a defendant is in community custody. RCW 9.94A.505(9), .703(3)(f). A "crime-related prohibition" prohibits "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "Directly related" includes conditions that are "reasonably related" to the crime. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015); see also State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). The jury convicted Vazquez-Santos of molesting his stepdaughter from the age of 7 through 13 years old. The prohibition restricting him from unsupervised contact with minors reasonably relates to the crime.[8]

We conclude the trial court did not abuse its discretion in denying Vazquez-Santos' motion for a new trial, his lawyer was not ineffective, there is no cumulative error, and he does not establish error in his statement of additional grounds. We affirm his conviction and sentence for one count of child

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[8] Vazquez-Santos also raises in his statement of additional grounds the claim that his attorney did not "allow" him to testify. As already discussed, sufficient evidence does not support his claim.

molestation in the first degree and one count of child molestation in the second degree.

Bowman, J

WE CONCUR:

Smith, J.

Mann, C.J.

NIELSEN KOCH P.L.L.C.

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