

November 16, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

VERL LEROY LEE,

Appellant.

No. 54577-2-II

UNPUBLISHED OPINION

WORSWICK, J. — Verl Lee’s first trial on two counts of first degree child molestation resulted in a hung jury. Lee was convicted of both counts following a second jury trial. He appeals his convictions, arguing that his defense counsel rendered ineffective assistance by failing to impeach the State’s witnesses with inconsistent testimony from the first trial and that insufficient evidence supported the convictions. In a statement of additional grounds for review, Lee challenges the jury’s implied findings on witness credibility, the weight given to witness testimony, and whether the State met its ultimate burden of proving the elements of his crimes beyond a reasonable doubt. We disagree with all of his arguments and affirm.

FACTS

Ken and Luann Lee have custody of their granddaughters, AC and SC, who were seven and six years old, respectively, at the time of trial. They live next door to Ken’s uncle—Verl Lee—and his wife—Marsha.¹ The two families spent a lot of time together. Ken, Luann, Lee,

¹ We refer to Ken Lee, Luanne Lee, and Marsha Lee by their first names for clarity. We intend no disrespect.

and Marsha would play cards at Lee's home at least once a week. While the adults played cards, AC and SC would watch television in the living room.

During one day of first grade, AC was asked to write about her family, and she chose to write about her "Uncle Verl." When her teacher encouraged her to be more descriptive, AC said "I don't want to be inappropriate." Report of Proceedings (RP) (Nov. 15, 2019) at 666. AC's teacher pulled her aside and asked what she meant. AC explained, "Sometimes he likes to touch my booty." RP (Nov. 15, 2019) at 666. AC also told her teacher "sometimes he likes to touch the front, too. . . It feels really good when he touches that." RP (Nov. 15, 2019) at 667. As mandatory reporters, AC's teacher and principal contacted child protective services. During a forensic interview, AC disclosed that she had seen Lee touch SC. Investigators then did a forensic interview with SC, during which SC disclosed that Lee liked to pat and touch her bottom.

The State charged Lee with two counts of first degree child molestation. The case proceeded to a jury trial, but the jury was unable to reach a unanimous verdict. The trial court declared a mistrial. The State proceeded with a second trial.

SC testified at the second trial. SC testified that she and her sister would go to Lee's house on Fridays. SC testified that Lee called her bottom "bahooty." RP (Nov. 15, 2019) at 613. SC recalled that while the adults set up playing cards, Lee would sit on the couch in the television room with SC and AC. According to SC, Lee would sit between the two girls and put his hands underneath their pants and underwear. On cross-examination, Lee asked SC, "if you're sitting on your bahooty, how is he able to get his hands in your pants and touch you?" RP (Nov. 15, 2019) at 623. SC responded, "Well, I think we—me and my sissy would, like,

stand up and then he would stick it in and then we would sit down. I don't remember."

RP (Nov. 15, 2019) at 623. SC denied talking to AC about it.

AC also testified at the second trial. She testified that when she was in kindergarten and first grade, Lee touched her bottom with his hand underneath her clothes and underwear more than one time. She also testified that one time he touched her "front part" with his finger and said "ooh." RP (Nov. 15, 2019) at 646. AC testified that sometimes Lee would ask her if he could touch her "bahooty." RP (Nov. 15, 2019) at 657.

Ken also testified at the second trial. He testified that Lee would often go into the living room with AC and SC. Ken testified that Lee frequently used the term "bahooty" to refer to the girls' bottoms and explained that the term had been "around the family for a long time."

RP (Nov. 15, 2019) at 684. Ken recalled a specific instance that made him uncomfortable:

I was watching TV one time he came over to our house and he was sitting in the chair across from me and—and I was watching TV and he was sitting in the chair. I have a visual of this that can't go out of my head, and he was—he had her nightgown, [AC]'s nightgown lifted up and he was rubbing her stomach, and [then] he would go down over her panties and down on her legs, and across to the other leg, and then back over her panties and up across her chest and—and I looked over at him, and I—and I was thinking: what are you doing? But his eyes were closed, and I thought, it could be nothing. And—and then he would do it again.

And he did this for probably five minutes, and I wanted to scream out and say something, but I—I just didn't do anything.²

RP (Nov. 15, 2019) at 686.

During his cross examination of Ken, Lee questioned why Ken had never before mentioned the incident when Lee rubbed AC under her nightgown in front of him: "And on any

² Ken did not mention this incident during his testimony at the first trial.

of the prior occasions where we have had an interaction, have you ever mentioned this incident about being at your house and [Lee] lifting up [AC]'s nightgown and rubbing her skin? RP (Nov. 15, 2019) 694. Ken responded:

I didn't mention that to you, no; but—no, I—I really didn't want to bring up all the personal things in our life, and how I didn't—because that means that I didn't say something to him, and then I'm failing because I let him get away with this.

....

I didn't fail to [mention this before]. I didn't, because I wanted this to go away, without—without this—without me being responsible for him going down. I thought it was going to be a—an easy thing, because the girls have said it, and it's true when they say something.

RP (Nov. 15, 2019) at 694-95.

Also on cross examination, Lee asked Ken if he was aware of whether Marsha had migraines or any health issues and if he was aware what she did to cope with them. Ken responded that he was aware that Marsha receives “all kinds of drugs” to “get really knocked out” and needs a shot from the hospital. RP (Nov. 15, 2019) at 692. Ken testified “[Marsha]'s actually addicted to drugs.” RP (Nov. 15, 2019) at 692. Lee asked how Marsha reacts to the shots and Ken responded, “She passes out.” RP (Nov. 15, 2019) at 692. Lee asked Ken if the girls were allowed to go to Lee and Marsha's when Marsha was not feeling well, and Ken responded that the girls were not allowed over on those days.

Luann testified in the second trial. She testified that after the allegations against Lee were brought to her attention, she went to talk to Lee about it. She recalled their conversation:

[H]e told me that the girls aren't lying, and—the strangest thing. I don't know—maybe it was because of the allegations, I don't want to decide for him why he said it, but he actually told me, “I want to assure you that the girls have never seen me without any clothes on,” and I just thought, okay.

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But—and then he also said before we—the girls have to go through anything, I’ll go sit in a jail cell before I’ll let anything happen to them.”³

RP (Nov. 15, 2019) at 709-10.

On cross examination, Lee asked Luann about AC’s truthfulness.

[LEE]: And has [AC] ever been known to tell lies?

[LUANN]: No, not really. She’s not a lying kind of a child. She’s pretty truthful about things.

[LEE]: Pretty truthful and seldom lies; is that fair to say?

[LUANN]: I don’t know a child who hasn’t told a lie in their life. She is an honest little girl. She tells the truth.

[LEE]: Most of the time?

[LUANN]: Yes. If you want to put it that way, yes.

RP (Nov. 15, 2019) at 716.

Detective Riley McNeal also testified at the second trial. Detective McNeal testified that he interviewed Lee about the allegations. During their conversation, Detective McNeal asked Lee if the girls were liars. Lee told him that he would not call them liars, but that they were mistaken.

³ During her testimony in the first trial, Luann also recalled the conversation:

He said that he didn’t do any of the things; that he’d never showed him (sic)—they never saw him naked; he said that he never kissed anybody’s behind; and I didn’t even know that that was one of the allegations. . . it was just almost more comforting me because I was an absolute mess. I was a wreck, and I was worried about what was going to happen to him, and still in disbelief of this whole thing. And he—had said before I see these girls have to go through it, I’ll go sit in a jail cell before I see them have to go through any of, I guess, assuming this trial stuff.

RP (Oct. 10, 2019) at 312.

Video recordings of forensic interviews with AC and SC were admitted at trial. In her forensic interview, AC explained that Lee would rub and pat her bottom and the “front part” of her “privates” both inside and outside of her pants and underwear. In SC’s recorded interview, SC described Lee rubbing and patting her bottom under and over her clothes.

At trial, Lee’s wife, Marsha, testified that AC was known to lie. She testified, “Well, I know that at our house she has been in trouble several times, and given a time out for lying, and talked to about it. And Ken says it just drives him crazy when she does that, that they were having a hard time breaking her of it.” RP (Nov. 15, 2019) at 881.

Lee testified in his defense at trial. He testified that AC made up the allegations of Lee touching AC and SC underneath their clothing because she has “a very serious problem with lying.” RP (Nov. 15, 2019) at 926.

She has been put in time out multiple times at my house. . . By Ken, for lying. I’ve been at their house when he’s had to put her out on time out for lying. My understanding is, and I don’t think it’s wrong, is that she has been in trouble at school for lying. She has a real problem with it, and I think they need to address that and take care of it with her and get her some professional help.

RP (Nov. 15, 2019) at 926.

Lee also testified about a conversation he had with Luann after the allegations were made:

Luann came up to the house and she was crying and she sat on our living room couch, and she said, “I can’t stand the thought of calling one of my girls a liar,” and I told her—I said, “Then don’t call her a liar, just say she’s mistaken.” She said, “But I just can’t stand that. And so she stayed there for—for quite a while, and was having a real tough time with it, not knowing exactly what to do.

. . . .

I told her, I said, “I have never touched the girls inappropriately. They have never seen me naked. They’ve never even seen me without a shirt on, let alone naked. They have in never any way touched me.”

RP (Nov. 15, 2019) at 930-31. Lee denied ever touching AC or SC inappropriately.

The jury returned guilty verdicts on each count.

Lee appeals his convictions.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Lee argues that his defense counsel rendered ineffective assistance by failing to impeach Ken and Luann with their prior sworn testimony from the first trial and by failing to object to Ken's testimony about Marsha's drug use. We disagree.

To prove that he received ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842 (2018). Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). We strongly presume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish prejudice, the defendant must show a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

A. *Ken's Testimony*

1. *Belly Rub*

Lee argues that defense counsel should have impeached Ken with his prior testimony by pointing out that Ken never mentioned the incident involving Lee rubbing AC's belly during the first trial. Lee acknowledges that defense counsel did confront Ken on the fact that he had never mentioned the incident before, but argues he should have specifically referenced that Ken's prior testimony was under oath and that the first trial resulted in a hung jury in order to establish Ken's motive to change his story. We hold that Lee fails to show that defense counsel's approach was not a legitimate tactical decision.

Defense counsel questioned Ken about his failure to previously mention the belly rub incident. Ken responded by explaining that he was hesitant to share because it occurred in his house and he felt like a failure for not saying something. He also expressed that he did not want to be "responsible for [Lee] going down" given their close familial relationship. RP (Nov. 15, 2019) at 695. At that point, defense counsel appears to have made the tactical decision to not press the issue further. Ken's response was reasonably likely to arouse sympathy in the jury, and it is possible Lee's defense counsel wanted to mitigate that impact. Tactical decisions cannot support a claim for ineffective assistance of counsel, and given our strong presumption that counsel is effective, we hold that Lee fails to show that counsel performed deficiently by not specifically referencing Ken's prior testimony under oath or the prior hung jury.

2. *Marsha's Illness and Treatment*

Lee also argues that defense counsel rendered ineffective assistance by not objecting to Ken's testimony about Marsha's drug use for her migraines. Lee argues that Ken's testimony

that Marsha is addicted to strong prescription medication to cope with her migraines constituted improper character evidence. But the proper question before our court is not whether Ken's testimony was admissible under ER 608, but rather whether his defense counsel rendered ineffective assistance.

The testimony Lee refers to came in response to defense counsel's questioning during cross-examination. The State's evidence showed that whenever Lee touched the children, other adults were nearby playing cards or socializing. Defense counsel attempted to counter the State's case by arguing that if Lee had wanted to molest the children, he could have taken advantage of times no other adults were around. To do so, on cross-examination, defense counsel asked Ken what Marsha does to remedy or cope with her migraine disorder and how she reacts to the medication. RP 691-92. Defense counsel used the evidence that Marsha was regularly indisposed because of her medication to argue that Lee would have had ample opportunity to molest the children while his wife was napping after her treatment, but instead he asked that they stay away when Marsha was not feeling well. RP 1-17-20 at 990-91. This line of questioning was clearly strategic.

There are legitimate trial tactics that explain defense counsel's questioning and decision not to object to Ken's responses. Because Lee cannot show the absence of any legitimate trial tactic, he cannot show that his defense counsel's performance was deficient, and his ineffective assistance claim fails.

B. *Luann's Testimony*

Lee also argues that his defense counsel rendered ineffective assistance by not impeaching Luann with her testimony from the first trial when she testified about her

conversation with Lee after learning of the allegations. He specifically takes issue with Luann's testimony in the second trial that Lee told her "the girls aren't lying," characterizing it as tantamount to allowing a confession to be introduced to the jury. Br. of Appellant 9. Lee argues that counsel should have pointed out that, in the first trial, Luann did not testify that Lee said "the girls aren't lying," and instead testified that Lee "said that he didn't do any of the things; that he'd never showed them (sic)—they never saw him naked; he said that he never kissed anybody's behind." RP (Oct. 10, 2019) at 312. Because Lee cannot show that the failure to impeach Luann on this issue prejudiced him, his claim fails.

Lee fails to acknowledge that other witnesses, including Lee himself, testified that Lee said he would not say the girls were lying. Detective McNeal testified that during his interview with Lee, Lee told him that he would not call AC and SC liars, but that they were mistaken. Most notably, Lee himself testified at length about how he would not call the girls liars, he would call them mistaken. He explained his conversation with Luann, testifying that he told Luann "[D]on't call [AC] a liar, just say she's mistaken." RP (Nov. 15, 2019) at 931. It defies reason to argue that had defense counsel pointed out that Luann did not previously testify that Lee told her "the girl's aren't lying" the result of the trial would have been different when similar evidence was introduced through Detective McNeal and Lee.

Nor can Lee show that the result of trial would have differed had defense counsel pointed out that Luann previously testified that Lee told her he had not done "any of the things." The previous testimony that Lee argues defense counsel should have impeached Luann with was ambiguous. It is unclear whether "the things" Lee was referring to were the alleged crimes, or

the acts of seeing him naked and kissing the girls' bottoms. While not irrelevant, the difference in details of Luann and Lee's conversation was not of particular significance.

Ultimately, the key evidence in the case was the testimony of Lee, AC and SC about the incidents underlying the charges. Lee testified in his defense at trial and adamantly denied the allegations against him. He also testified about his conversation with Luann and said that he told her he did not do the things the girls accused him of. In closing argument, defense counsel argued that Luann and Ken had coordinated their testimony, that AC and SC's testimony was not credible, and that Lee was credible. The jury was tasked with weighing the evidence and assessing witness credibility, and it found Lee guilty. Lee cannot now show that the jury would have come to a different conclusion if only defense counsel had impeached Luann with her prior testimony.

II. INSUFFICIENT EVIDENCE

Lee also argues that the State failed to present sufficient evidence to support his first degree child molestation convictions. We disagree.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). We consider direct and circumstantial evidence as equally reliable when evaluating the sufficiency of the evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). We also "defer to the trier of fact on issues of conflicting testimony, credibility

of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To prove Lee guilty of each count of first degree child molestation, the State had to prove beyond a reasonable doubt that (1) Lee had sexual contact with AC and SC; (2) AC and SC were less than 12 years old at the time of the sexual contact and were not married to Lee; (3) AC and SC were at least 36 months younger than Lee; and (4) that the act occurred in the State of Washington. RCW 94A.44.083. RCW 9A.44.010(2) defines “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” The term “intimate parts” has been interpreted to have a broader connotation than sexual and to include “parts of the body in close proximity to the primary erogenous areas.” *In re Welfare of Adams*, 24 Wn. App. 517, 519-21, 601 P.2d 995 (1979). “Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.” *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991).

Lee challenges only the evidence supporting the element that he had sexual contact with AC and SC, he argues that the State failed to prove that the touching was done for the purpose of gratifying sexual desire. Lee does not argue—nor does the evidence suggest—that he was acting in a caretaking role when he touched AC and SC. As a result, evidence that Lee touched the intimate parts of AC and SC supports an inference that the touching was for the purpose of sexual gratification. *Powell*, 62 Wn. App. at 917.

AC and SC both testified that Lee would regularly put his hand down their pants and underneath their underwear, touching their bare bottoms. SC testified to seeing Lee put his hand

underneath AC's underwear. AC also testified that Lee used his pointer finger to rub her "front part." In their forensic interviews, both AC and SC recalled Lee touching their bottoms underneath their underwear, and AC described Lee rubbing her "front part" of her "privates" with his finger. On review of a claim that the State presented insufficient evidence, we accept the State's evidence as true. *Homan*, 181 Wn.2d at 106. Given the State's evidence that Lee rubbed and patted the bare bottoms of AC and SC and used his finger to rub the "front" of AC's genital area, which we take as true, the touching alone raises an inference that the touching was for the purpose of sexual gratification. *Powell*, 62 Wn. App. at 917.

Viewing the evidence in the light most favorable to the State, as we must, we hold that this evidence was sufficient to prove that Lee touched AC and SC for the purpose of sexual gratification. Lee's claim that the State presented insufficient evidence to support his first degree child molestation convictions fails.

III. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his SAG, Lee challenges the jury's implied findings on witness credibility, the weight given to witness testimony, and whether the State met its ultimate burden of proving the elements of his crimes beyond a reasonable doubt. Specifically, Lee argues that (1) SC had to have been coached between her pre-trial interview and her testimony in the second trial; (2) the State presented insufficient evidence of any inappropriate touching of a sexual nature; (3) AC and SC simply made up the stories of him touching them inappropriately; and (4) AC is not a truthful person. As we have already addressed, the persuasiveness, credibility, and weight of the evidence presented at trial are matters for the trier of fact and are not subject to review by this court. *Thomas*, 150 Wn.2d at 874-75.

The jury watched SC's video recorded forensic interview and also observed her live trial testimony. Likewise, the jury heard the evidence presented by both the State and the defense, including Lee's own explanation that the girls simply made up the allegations as a story and his and Marsha's testimony that AC has a problem with lying. Lee's SAG arguments boil down to an argument that the jury came to the wrong conclusions. As the trier of fact, the jury was tasked with considering witness credibility and weighing the persuasiveness of the evidence presented; here, the jury found Lee guilty of both counts. Accordingly, we do not further address these arguments.


We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




Worswick, J.

We concur:



Glasgow, A.C.J.



Veljacic, J.