

August 31, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GARY EDWARD REDDING,

Appellant.

No. 54591-8-II

UNPUBLISHED OPINION

LEE, C.J. — Gary E. Redding appeals his judgment and sentence, arguing that it contains a scrivener’s error. The State agrees that Redding’s judgment and sentence contains a scrivener’s error.

Redding also raises several claims in a statement of additional grounds (SAG)¹ for review. Redding claims that (1) he is entitled to a retrial because a juror fell asleep during testimony, (2) he received ineffective assistance of counsel, (3) the victim’s testimony was not credible, (4) he had a heart valve replacement during a portion of the charging period, and (5) he was “handcuffed during a break in front of the jury.” SAG at 2.

We agree that Redding’s judgment and sentence contains a scrivener’s error. With regard to the SAG claims, we hold that Redding’s claims regarding a juror falling asleep, receiving ineffective assistance of counsel, challenging the credibility of the victim’s testimony, and about being handcuffed in front of the jury fail. We decline to address Redding’s statement concerning

¹ RAP 10.10.

his heart valve surgery because he fails to inform this court of the nature and occurrence of the alleged errors and relies on evidence outside of the record on appeal. Accordingly, we affirm Redding's convictions but remand to the trial court to correct the scrivener's error in Redding's judgment and sentence.

FACTS

A. CHARGING INFORMATION

On November 21, 2018, the State charged Redding with one count of second degree rape and three counts of second degree rape of a child. The State alleged that Redding raped I.R.G.² several times between March 28, 2013, and March 27, 2015. I.R.G. was between the age of 12 and 14 during the alleged incidents.

The State filed a persistent offender notice at the time of charging. The notice informed Redding that a conviction for any of the charged offenses would result in a lifetime sentence without the possibility of release based on his criminal history.

Redding pleaded not guilty to all counts, and the case proceeded to a jury trial.

B. TRIAL

During a break at trial, an incident occurred where Redding was about to be handcuffed as the jury left the courtroom. The jury did not see Redding in handcuffs and did not react to the sound of the handcuffs being pulled out by a Department of Corrections officer:

THE COURT: Okay. So as the jurors were filing out, some of us noticed—I was watching them but there was a little noise from the corrections officer like handcuffs, and I think he got his handcuffs out. All the jurors were facing the other way. I mean, were going in. I don't know that they understood what the noise was. Some of us saw it.

² We use initials for this witness pursuant to our General Order 2011-1.

[Defense counsel], I don't know if you want to make more of a record.

[Defense Counsel]: I'm standing over here right now, for the record, I'm over here near close to when [sic] my client is and obviously where it happened. It was a short thing, about taking—he was starting to communicate to me that they were going to take my client down to 250 for the short break. Handcuffs came out. I heard the jingling; I saw it. I immediately turned over to look.

It seemed to me that all the jurors were facing straight forward and walking into the jury room. And since I was immediately worried, that's what I was watching for, to see if any of them made any reaction.

And I will also note that I had—as soon as he pulled them out, I said, "Wait" or made some motion and the deputy had them in his hand to keep them from making any more noise and lower them.

....

THE COURT: I also will note, several of the jurors were already out of the courtroom.

....

THE COURT: None of the jurors noticed.

5 Verbatim Report of Proceedings (VRP) at 523-25. Defense counsel did not request a mistrial or a limiting instruction.

C. JURY VERDICTS

The jury did not reach a unanimous verdict with respect to Count I, which charged Redding with second degree rape. As a result, the trial court found the jury "deadlocked" and ordered a mistrial on Count I. Clerk's Papers (CP) at 28.

The jury found Redding guilty on Counts II and III, which charged Redding with second degree rape of a child in each count.³

³ During trial, Redding moved to dismiss Count IV, which charged him with second degree rape of a child. The trial court granted Redding's motion and dismissed Count IV.

D. SENTENCING

At the sentencing hearing, the State recommended life in prison without the possibility of release because of Redding's previous conviction for attempted second degree rape of a child. The State offered Redding's 2004 guilty plea and judgment and sentence in support of its recommendation. The trial court agreed that a life sentence without the possibility of parole was appropriate based on Redding's "criminal history" and "predatory nature with young girls." 7 VRP at 660.

Redding was sentenced to life in prison without the possibility of release. The judgment and sentence referenced Redding's conviction for Counts "I and II" instead of Counts "II and III." CP at 67. The judgment and sentence also referenced "RCW 9.94A.030(31)(b)(i)" as the statutory provision applying to Redding as a "persistent offender." CP at 67. "RCW 9.94A.030(31)(b)(i)" is a nonexistent statutory subsection.⁴

⁴ Former RCW 9.94A.030(31) (2019) provided that

"[l]egal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

The trial court entered an order correcting the judgment and sentence to reflect Redding's conviction on "Counts II and III." CP at 77-79. However, the statutory provision which defined Redding as a "persistent offender" remained unchanged.

Redding appeals.

ANALYSIS

Redding argues that there is a scrivener's error in his judgment and sentence which incorrectly identifies former "RCW 9.94A.030(31)[sic](b)(i)" as the statutory provision defining him as a "persistent offender." Br. of Appellant at 2-3. The State agrees the judgment and sentence contains a scrivener's error and should be corrected.⁵ We also agree and remand to the trial court to correct Redding's judgment and sentence.

A scrivener's error is a clerical mistake that, when amended, would correctly convey the trial court's intention, as expressed in the record at trial. *State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. *See State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016) (remanding case to trial court to correct scrivener's error in judgment and sentence).

⁵ Although the State agrees that the wrong statutory citation is a clerical error and should be corrected, the State argues that we should treat Redding's appeal as a "motion and give leave to the trial court under RAP 7.2(e)." Br. of Resp't at 3. The State misapprehends RAP 7.2(e). RAP 7.2(e)(2) allows a trial court to hear and determine post-judgment motions that will change a decision being reviewed by the appellate court. However, RAP 7.2(e)(2) requires the post-judgment motion to be first heard in the trial court. Here, the record does not reflect that a post-judgment motion requesting to correct the clerical error at issue was filed or heard in the trial court; thus, the issue is before this court on direct appeal. Also, there is a SAG filed in this appeal, which is appropriately determined by this court.

In relevant part, former RCW 9.94A.030(38)(b)(i)-(ii) (2019) defines a “persistent offender” as an offender who

(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion . . . or (C) an attempt to commit any crime listed in this subsection (38)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. . . . A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

Here, Redding is a “persistent offender” because of his previous conviction for attempted second degree rape of a child. *See* former RCW 9.94A.030(38)(b)(i). And consistent with former RCW 9.94A.030(38)(b)(i)-(ii), the trial court stated its intention to sentence Redding to life in prison without the possibility of release because of his status as a “persistent offender.” However, the judgment and sentence references “RCW 9.94A.030(31)(b)(i),” which does not exist. CP at 67. Because the record reflects that the trial court intended to reference the statute defining “persistent offender,” we remand to the trial court to correct the scrivener’s error on Redding’s judgment and sentence.

SAG⁶

Redding makes five SAG claims: (1) he is entitled to a retrial because a juror fell asleep during testimony, (2) he received ineffective assistance of counsel because defense counsel would not introduce polygraph evidence on his behalf, (3) I.R.G.'s testimony was not credible, (4) he had a heart valve replacement during a portion of the charging period, and (5) he was "handcuffed during a break in front of the jury." SAG at 2.

A. JUROR FALLING ASLEEP

Redding argues that he is entitled to a retrial because a juror allegedly fell asleep during trial. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a fair trial by an impartial jury. *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540, *review denied*, 186 Wn.2d 1028 (2016). "A sleeping juror may prejudice the defendant's due process rights and right to an impartial jury." *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 146, 385 P.3d 135 (2016).

To reverse a conviction because of a sleeping juror, this court must find prejudice to the defendant. *See id.* (dismissing claim about sleeping jurors because appellant did not show "specific evidence of prejudice due to the drowsiness of any juror"); *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986) (dismissing claim about drowsy jurors because "[n]othing suggest[ed] that the jury drowsiness problem was such as to prejudice the defendant"). At a

⁶ Redding filed this SAG on November 25, 2020, which is well past the 30-day time limit. *See* RAP 10.10(d). However, a commissioner of this court accepted Redding's untimely SAG for filing. *See Ruling*, Dec. 4, 2020. Therefore, we address Redding's SAG claims.

minimum, the defendant generally must show “how long the jurors slept or what specific testimony they missed by sleeping.” *Caldellis*, 187 Wn.2d at 146.

Here, the record does not show that a juror fell asleep during the trial. Moreover, even if a juror did fall asleep, Redding fails to show prejudice because he does not state “how long the juror[] slept or what specific testimony they missed by sleeping.” *Id.* Because the record fails to support Redding’s claim and Redding does not show any prejudice even if a juror did fall asleep, we hold that Redding’s claim fails.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Redding argues that he received ineffective assistance of counsel because defense counsel would not introduce polygraph evidence on his behalf. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). An ineffective assistance of counsel claim is a mixed question of fact and law that this court reviews *de novo*. *State v. Linville*, 191 Wn.2d 513, 518, 423 P.3d 842 (2018).

To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel’s performance was deficient and (2) counsel’s deficient performance prejudiced the defense. *Grier*, 171 Wn.2d at 32-33. If the defendant fails to satisfy either prong, the defendant’s ineffective assistance of counsel claim fails. *Id.* at 33.

Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *Id.* There is a strong presumption that counsel’s performance was reasonable. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing

that “there is no conceivable legitimate tactic explaining counsel’s performance.” *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). However, if counsel’s conduct can be characterized as a legitimate trial strategy or tactic, then counsel’s performance is not deficient. *Id.* To establish prejudice, the defendant must “prove that there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862.

Here, Redding’s ineffective assistance of counsel claim fails because he cannot show deficient performance. In Washington, the results of polygraph tests are not admissible absent stipulation from both parties. *In re Det. of Aston*, 161 Wn. App. 824, 843, 251 P.3d 917 (2011), *review denied*, 173 Wn.2d 1031 (2012). Because polygraph tests are generally inadmissible into evidence, defense counsel’s decision to not utilize polygraph testing could be viewed as a legitimate trial tactic, which does not amount to deficient performance. *See Grier*, 171 Wn.2d at 33. Further, Redding fails to show how the polygraph results were favorable to him. *See id.* Accordingly, Redding’s claim fails.

C. WITNESS CREDIBILITY

Redding contends that I.R.G.’s testimony was not credible because she lied under oath. Redding provides no further argument to support this alleged error and no context to support this court’s review.

Issues concerning witness credibility are solely within the province of the jury and will not be disturbed on appeal. *State v. Johnson*, 2 Wn. App. 743, 744, 472 P.2d 411 (1970). Therefore, we hold that Redding’s claim fails.

D. HEART VALVE REPLACEMENT DURING THE CHARGING PERIOD

Redding contends that “[he] also had a heart valve replacement on Sept. 18, 2014 and had a 1 year recovery and Rachel my wife was with me the whole time that year none of this could of happend [sic] what the accuser has said.” SAG at 3. We decline to reach this issue.

RAP 10.10(c) states, “Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant’s statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.”

Here, Redding appears to be alleging he had an alibi. But, beyond this statement, Redding provides nothing further to inform the court of the nature of the alleged error, and the alleged error involves matters outside the record. Therefore, we decline to review this issue.

E. ALLEGED HANDCUFF INCIDENT

Redding claims that he was “handcuffed during a break in front of the jury.” SAG at 2. We hold that Redding’s claim fails.

It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Jackson*, 195 Wn.2d 841, 852, 467 P.3d 97 (2020). However, it is not reversible error simply because jurors see a defendant wearing shackles. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002); *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

In *Gosser*, the defendant moved for a mistrial, contending that his right to a fair trial was prejudiced when several jurors observed his shackles being removed outside the courtroom. 33 Wn. App. at 435. Gosser did not request a curative instruction and could point to nothing other than the jury’s brief view of him in shackles to support his contention that only a new trial would

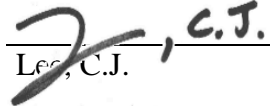
cure the prejudice. *Id.* at 435-36. There, the court held that, “beyond defendant’s bare allegation, there is no indication in the record that the incident prejudiced the minds of the jurors against defendant.” *Id.*

Here, the record shows that none of the jurors leaving the courtroom saw Redding in handcuffs because they were all facing the opposite direction when leaving the courtroom. Significantly, the record shows that Redding was never in handcuffs in front of the jury—the deputy merely pulled out handcuffs then kept “them in his hand to keep them from making any more noise” and “lower[e]d them”. Vol. 5 VRP at 524. While some of the jurors may have heard the sound of the handcuffs being pulled out by the corrections officer, the record clearly shows that none of the jurors reacted to any sound as they were leaving the courtroom. Similar to *Gosser*, because the record shows that Redding was not in handcuffs in front of the jury and none of the jurors reacted to the sound of the handcuffs being pulled out, “there is no indication in the record that the incident prejudiced the minds of the jurors against defendant.” 33 Wn. App. at 435-36. Thus, Redding’s claim fails.

We affirm Redding’s convictions but remand to the trial court to correct the scrivener’s error in Redding’s judgment and sentence.

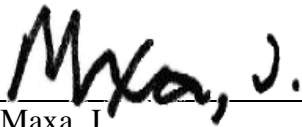
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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

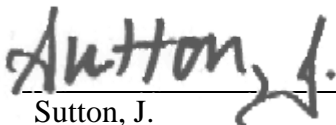


Lee, C.J.

We concur:



Maxa, J.



Sutton, J.