

23-476-3

634

NO. 63476-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LEONARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant who claims that his trial attorney had a conflict of interest must show an actual conflict of interest that adversely affected counsel's performance. An actual conflict cannot be speculative; rather, an actual conflict occurs where counsel and the defendant have truly divergent interests. In this case, defense counsel made an errant remark in opening statement that opened the door to some additional damaging evidence. After advising the defendant that she could ask for a mistrial, the defendant chose to proceed because he was satisfied with the jury that had been selected. Under the circumstances presented in this case, both options were equally reasonable. Should the defendant's conflict of interest claim be rejected?

2. A defendant who claims that he received ineffective assistance of counsel must show both that counsel's performance was deficient and that prejudice resulted. Matters of trial strategy or tactics cannot be used as the basis for a claim of ineffective assistance of counsel. In this case, as stated above, moving for a mistrial or going forward with the trial were equally reasonable strategic choices. In addition, the record demonstrates that the defendant did not suffer material prejudice from the introduction of

the additional evidence. Should the defendant's ineffective assistance of counsel claim be rejected?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Steven Leonard (aka "Pepper"), with two counts of rape of a child in the second degree and one count of promoting commercial sexual abuse of a minor as a result of his conduct with the 12-year-old victim, C.V., in early January 2008. CP 1-7. A jury trial was held in March and April 2009 before the Honorable Michael Hayden.

During pretrial motions, Leonard's defense counsel moved to exclude any testimony from witnesses J.K., K.F.,¹ or others that Leonard was a known pimp. RP (3/12/09) 16-17. The trial court questioned whether such testimony would be improper propensity evidence, reserved ruling on the issue, and asked the parties to consider the matter further. RP (3/12/09) 17-21. After the parties submitted authority for the court's consideration, the court indicated

¹ In addition to the victim, C.V., other witnesses in this case were minors as well. They will be referred to here by their initials, and, where appropriate to protect their identities, their relatives who testified will be referred to by first name and last initial.

that it was inclined to allow such testimony if Leonard was representing himself to be a pimp during the charging period, but inclined not to allow such testimony if it were in reference to the past. The court also invited the parties to submit further relevant authority if possible. RP (3/30/09) 3.

During the defense's opening statement, Leonard's attorney said, "And you'll hear what Pepper does for a living. He doesn't pimp girls, he sells weed. He sells marijuana." RP (3/30/09, opening stmts.) 34. Immediately after opening statements, the trial court ruled that defense counsel's remarks had opened the door to evidence that Leonard characterized himself as a pimp, whether during the charging period or otherwise. RP (3/30/09) 19-20. The trial court then gave the defense a choice as to whether to proceed with the trial or not in an effort to minimize or eliminate appellate issues:

Unless [Leonard] recognizes the door's open, is satisfied with the way the case is going and wants to go forward, and he can certainly make that decision.

He can say I like this jury, I like the way the case has gone, I'm -- I think my counsel's done a good job, despite what the judge has said, and I want to go ahead, he can do that.

But we're going to do it now, rather than two years from now.

RP (3/30/09) 21-22. Significantly, the court further noted that Leonard's telephone calls from jail would be admitted in any event, and that the State had indicated that those phone calls contained "incriminating self-characterization" as well. RP (3/30/09) 22.

After discussing the matter with Leonard, defense counsel informed the court that she had explained that she could move for a mistrial, but that Leonard wanted to proceed because he was satisfied with the way the case was going and with the jury that had been selected. RP (3/30/09) 23-24. Counsel also stated that her choice would have been to move for a mistrial because she feared that Leonard "will have waived the appellate issue" by going forward. RP (3/30/09) 24. The trial court then further explained the situation to Leonard. RP (3/30/09) 24-26. Counsel and Leonard were then given additional time to confer, after which Leonard reiterated his desire to proceed and stated that he had no further questions for the court. RP (3/30/09) 26-27.

At the conclusion of the case, the jury convicted Leonard as charged. CP 30-32. Leonard received a standard-range sentence of at least 280 months in prison. CP 68-78. Leonard now appeals. CP 79-90.

2. SUBSTANTIVE FACTS

12-year-old C.V. and her two sisters live in Seattle with their grandmother, Laura C. RP (3/30/09) 109. On January 9, 2008, C.V. was supposed to ride the bus to the Boys and Girls Club after school with her younger sister. RP (3/30/09) 112. Instead, C.V. wanted to ride the bus downtown with a friend. RP (4/1/09) 52. C.V. called her grandmother to ask her permission, but Laura C. would not allow it, and they got into an argument about C.V.'s plans. C.V. took the bus downtown with her friend against her grandmother's wishes. RP (4/1/09) 53.

After leaving her friend downtown, C.V. had planned to take the bus to the Boys and Girls Club, but she was then approached by 23-year-old Leonard near Westlake Center. He introduced himself as "Pepper" and asked C.V. if she wanted to "hang out" with him and his friends. RP (4/1/09) 53-55. One of Leonard's "friends" was 13-year-old J.K., a longtime school acquaintance of C.V.'s. RP (4/1/09) 55. C.V. agreed to stay downtown with them. RP (4/1/09) 57.

Eventually, Leonard, J.K., C.V., and another adult male named Marlin Holmes boarded a bus to Federal Way. RP (4/6/09) 97. Leonard had told J.K. and Holmes that they were going to "run

a train" on C.V., meaning that they would all have sex with her one after the other. RP (4/6/09) 103-05. J.K warned Leonard to stay away from C.V. because she was approximately the same age as he was. RP (4/6/09) 119. In addition, J.K. talked to C.V. on the bus and tried to warn her about Leonard. RP (4/1/09) 62; RP (4/6/09) 99. J.K. told C.V. that Leonard was "a pimp and he gots (sic) girls and all that stuff." RP (4/6/09) 120. J.K. also told C.V. she shouldn't lie about her age because someone could get "in trouble." RP (4/6/09) 101. Leonard was within earshot when J.K. said these things. RP (4/6/09) 102.

Leonard, J.K., C.V. and Holmes got off the bus at a park and ride, and Leonard took C.V. aside to talk to her. RP (4/1/09) 64. Leonard convinced C.V. to go behind a building and perform fellatio on him. RP (4/1/09) 65-66. Leonard then told C.V. that she should have sex with J.K., and she agreed. C.V. and J.K. went behind some bushes and had vaginal intercourse. RP (4/1/09) 111-12. After that, C.V. had vaginal intercourse with Marlin Holmes. RP (4/1/09) 70-72. The group then took a bus back to downtown Seattle. RP (4/1/09) 74.

Leonard convinced C.V. that she should stay with him, and told her that he wanted her to meet a girlfriend of his. RP (4/1/09)

75-76. After this discussion, Leonard and C.V. got off the bus in a neighborhood and had vaginal intercourse somewhere outdoors. RP (4/1/09) 80-81. That night, after spending several more hours together in downtown Seattle, C.V. and Leonard spent the night at Amanda Pederson's apartment. RP (4/1/09) 82-83.

Amanda Pederson considered herself to be Leonard's girlfriend,² and she did not want C.V. to stay the night. RP (4/2/09) 18-22. Nonetheless, she allowed Leonard and C.V. to sleep on the floor of her bedroom three nights that week. RP (4/2/09) 22, 33-34, 37-38. On two of those three occasions, Leonard had vaginal intercourse with C.V. RP (4/1/09) 98-99, 117. The one night that Pederson did not allow Leonard and C.V. to stay with her, Leonard and C.V. stayed in a shed behind an unoccupied house. RP (4/1/09) 112. Leonard also had vaginal intercourse with C.V. in the shed. RP (4/1/09) 113. C.V. left a pink pair of panties in the shed, so she got a black pair of panties from Pederson. RP (4/1/09) 114.

² According to Pederson, Leonard had stopped being a pimp about a year before she met him. RP (4/2/09) 72.

During the five-day period that C.V. spent with Leonard, Leonard also introduced C.V. to his 15-year-old girlfriend, K.F.³ RP (3/31/09) 175-76, 182, 189. K.F. immediately confronted C.V. about her young age, and told Leonard that he could get in "huge trouble" for harboring a juvenile runaway. RP (4/1/09) 7-8. K.F. and Leonard got into an argument about C.V., and K.F. felt that Leonard was choosing C.V. over her. RP (4/1/09) 13-14. Leonard told K.F. that he was "choosing the money(.)" RP (4/1/09) 19.

On one of the days that C.V. spent with Leonard, while they were riding on a bus, Leonard told C.V. that they needed money, and they discussed C.V. engaging in prostitution. RP (4/1/09) 103. Leonard told her "it would just be an easy quick thing," and that both Pederson and K.F. did it. RP (4/1/09) 104. Leonard told C.V. how much money to charge for particular sex acts, and told her how to walk on the highway and look for customers. He also specifically told her not to reveal her true age. RP (4/1/09) 105-07. C.V. did not want to engage in prostitution, but she agreed to do it anyway. RP (4/1/09) 105.

³ According to K.F., Leonard had asked her in the past if she was willing to engage in prostitution on his behalf, but she had said "hell no." RP (3/31/09) 185-86.

C.V. walked on the side of Pacific Highway South until a man in a minivan pulled over. RP (4/1/09) 108. C.V. got into the vehicle and agreed to perform fellatio for \$38. RP (4/1/09) 110. After performing the sex act and acquiring the money, C.V. bought some food at 7/Eleven and gave the rest of the money to Leonard. Leonard used the money to buy marijuana. RP (4/1/09) 111.

C.V.'s odyssey with Leonard came to an end because she had left her school books at K.F.'s house. When K.F. found the books, she called the phone number written inside and reached C.V.'s grandmother, Laura C. RP (4/1/09) 22-23. K.F. told Laura C. who C.V. was with and where she might be found. RP (4/1/09) 23. C.V.'s uncle, Dean M., went looking for her until he spotted her walking with Leonard and Pederson near Westlake Center. RP (4/6/09) 143. As Dean M. was escorting C.V. to his friend's vehicle, he told Leonard "that he was going to jail because [C.V.] was twelve years old." RP (4/6/09) 146. Leonard was arrested the following day. RP (3/30/09) 64-65.

DNA testing of the evidence in this case revealed C.V.'s genetic profile and the profile of an unknown male on the black panties that C.V. had borrowed from Pederson, C.V.'s profile and the profile of Marlin Holmes on the pink panties that C.V. had left

behind in the shed, and Leonard's profile in semen stains on the blankets that he and C.V. had slept on in the shed and at Pederson's apartment. RP (4/6/09) 23-39.

After Leonard's arrest, he made numerous telephone calls from the jail and he sent a number of letters that came into the possession of the police. Ex. 46, 47, 67-73. In one of his many letters to Pederson, he wrote her a rap song in which he urged her to "come to court an (sic) lie for me, keep it do or die for me." RP (4/2/09) 60-61. He also called Pederson repeatedly and asked her to find and abduct C.V., and to get her to "change her story(.)" RP (4/2/09) 67-70. In another call, Leonard suggested that C.V. could stay with his friend Marcus, and that Marcus could put C.V. "on the track," meaning that she would prostitute herself. RP (4/6/09) 165. Leonard also suggested calling Child Protective Services and making a false report of child abuse against C.V.'s uncle, Dean M. RP (4/6/09) 167. In addition, in a letter to K.F., Leonard suggested that she could help him explain any DNA evidence by saying that C.V. got Leonard's DNA on her crotch by touching K.F.'s vagina and then touching herself. RP (4/1/09) 30-33.

Leonard testified in his own defense, and denied that he had had sex with C.V. or involved her in prostitution. RP (4/7/09) 6-7. He also claimed that he used the word "pimp" as slang for a person of status, not an actual pimp. RP (4/7/09) 220-22. Although Leonard admitted to making the calls and writing the letters that had been introduced against him, he claimed that he just wanted everyone to tell the truth. RP (4/7/09) 235-36, 242-43, 261-64. Leonard admitted that he had told Pederson to try to get the blankets and C.V.'s panties out of the shed, but said it was only because Pederson wanted her blankets back. RP (4/8/09) 18. Leonard could not really explain why he wanted Marcus to put C.V. "to work on the track." RP (4/7/09) 237.

C. ARGUMENT

1. LEONARD CANNOT SHOW THAT HIS ATTORNEY HAD AN ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HER REPRESENTATION.

Leonard first argues that his trial attorney had an actual conflict of interest, and that this actual conflict of interest adversely affected her representation of Leonard. More specifically, Leonard claims that his attorney had an actual conflict of interest because she "opened the door" to incriminating evidence during opening

statements, disagreed with Leonard as to whether to move for a mistrial or proceed, and failed to "argue her own ineffectiveness in support of a mistrial" when Leonard decided that he wanted to proceed. Brief of Appellant, at 19-29. This claim is without merit.

As a preliminary matter, Leonard cites no authority for the proposition that an actual conflict of interest arises based solely on an errant remark during an opening statement, and it is well-settled that a disagreement between counsel and client as to a matter of trial strategy does not constitute an actual conflict of interest. Moreover, Leonard's sole basis for arguing that his attorney's representation was adversely affected is that his attorney did not argue more forcefully for a mistrial against Leonard's express wishes under circumstances where Leonard's choice to proceed was a reasonable one. This is not sufficient under the applicable legal test. This Court should reject Leonard's claim, and affirm.

In order to show a violation of the defendant's Sixth Amendment right to conflict-free counsel, "the defendant must always demonstrate that his or her attorney had a conflict of interest that adversely affected his or her performance." State v. Dhaliwal, 150 Wn.2d 559, 570, 79 P.3d 432 (2003) (citing Mickens v. Taylor, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291

(2002)). "[A]n actual conflict of interest means precisely a conflict that affected counsel's performance -- as opposed to a mere theoretical division of loyalties." Dhaliwal, 150 Wn.2d at 570 (emphasis omitted) (internal quotation marks omitted) (quoting Mickens, 535 U.S. at 171).

An actual conflict of interest is most likely to arise in situations where the attorney obviously represents conflicting interests, such as the joint representation of codefendants or the representation of both a witness and the defendant. See In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983), *overruled on other grounds by Dhaliwal*, 150 Wn.2d at 568-71. On the other hand, a conflict over a matter of trial strategy is *not* a conflict of interest. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). "Instead, this is the type of conflict that courts generally leave to the attorney and client to work out, absent actual ineffective assistance of counsel." Cross, 156 Wn.2d at 609; see also In re Personal Restraint of Stenson, 142 Wn.2d 710, 729, 16 P.3d 1 (2001) (no actual conflict of interest existed even though the disagreement between counsel and client was such that counsel stated he could not "stand the sight of" the defendant).

In short, an actual conflict of interest cannot be merely theoretical, and does not arise when counsel and client merely disagree as to a matter of trial strategy; rather, an actual conflict arises in situations where counsel must truly "struggle to serve two masters." State v. Robinson, 79 Wn. App. 386, 394, 902 P.2d 652 (1995) (quoting Glasser v. United States, 315 U.S. 60, 75, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

In this case, Leonard claims that his attorney's alleged "struggle to serve two masters" arose when she made a remark during her opening statement that had the effect of opening the door to evidence that Leonard was known to be a pimp prior to meeting C.V. However, Leonard cites no authority for the proposition that an actual conflict of interest arises due to an errant remark in an opening statement. Moreover, the cases that Leonard does cite clearly do not support his position.⁴

⁴ One of these cases is Douglas v. United States, 488 A.2d 121 (D.C. Ct. App. 1985), wherein the court held that the defendant could not be retried and the case had to be dismissed on double jeopardy grounds because the trial court had erroneously ordered a mistrial *sua sponte* after jeopardy had attached based on an alleged conflict of interest because the defendant had filed a bar complaint against his attorney. In citing this case, Leonard mistakenly asserts that the trial court's decision to order a mistrial was affirmed. See Brief of Appellant, at 23. Moreover, this Court has held that the filing of a bar complaint does not result in a conflict of interest in and of itself. State v. Sinclair, 40 Wn. App. 433, 437, 730 P.2d 742 (1986). Thus, Douglas is inapposite.

For instance, in United States v. Ellison, 798 F.2d 1102 (7th Cir. 1986), the defendant initially entered a plea agreement from which he later moved to withdraw. In support of his pro se motion to withdraw the plea, the defendant alleged that his attorney had urged him to plead guilty "because he did not want to make waves with the federal prosecutors with whom he would be working in the future." Ellison, 798 F.2d at 1106. During the hearing on the defendant's motion, the defendant's attorney noted that he had been given a Hobson's choice: he could either contradict his client to defend himself, thus defeating his client's interest in withdrawing the plea, or he could admit to committing malpractice to support his client's position, thus defeating his own interests as an attorney. Id. On these facts, the Court of Appeals correctly observed that counsel had a conflict of interest. Id. at 1107.

Similarly, in United States v. Sanchez-Barreto, 93 F.3d 17 (1st Cir. 1996), a defendant who pled guilty shortly before trial later moved to withdraw the plea on grounds that his attorney had pressured him into it in order to "hide [the attorney's] lack of preparation for trial." Sanchez-Barreto, 93 F.3d at 21. As in Ellison, the court found an actual conflict of interest because the attorney could not represent his client's interest in withdrawing the

guilty plea without endangering his own interests as a practicing lawyer. Id. at 21-22.

But unlike in Ellison and Sanchez-Barreto, Leonard and his attorney did not have divergent interests resulting in a Hobson's choice for counsel. Rather, both Leonard and his attorney had an interest in ensuring that Leonard would receive a fair trial. Accordingly, Leonard's attorney advised him that she could ask for a mistrial, which would secure that interest because any possible adverse effects stemming from her remark would be eradicated. Leonard chose not to follow that advice because he wanted to keep the jury that had already been selected, which was also a reasonable option. RP (3/30/09) 23, 38.

In sum, although Leonard and his attorney disagreed as to how best to secure a fair trial, their interest in a fair trial was a shared interest, not a conflicting one. Accordingly, Leonard's claim that counsel's errant remark in opening statement could have subjected her "to a claim of ineffective assistance or even malpractice," even if taken as true, is completely beside the point. Again, Leonard's interest for purposes of this analysis was his interest in a fair trial, not a malpractice suit, a bar complaint, or a claim of ineffective assistance of counsel on appeal. Therefore,

Leonard's claim of a conflict of interest on these grounds is wholly without merit.

Furthermore, to the extent that Leonard could claim a conflict of interest based on the disagreement with his attorney as to whether to request a mistrial, any claim on this basis would fail as well. As noted above, a difference of opinion regarding matters of trial strategy does not constitute a conflict of interest. Cross, 156 Wn.2d at 607. Therefore, no conflict arose from Leonard's and his attorney's difference of opinion as to whether a mistrial should be requested.

Lastly, as previously noted, Leonard's sole basis for claiming that his attorney's performance was adversely affected by an actual conflict of interest is that his attorney should have argued more strenuously for a mistrial, despite Leonard's express desire to proceed. Brief of Appellant, at 26. As will be discussed further in the next argument section, Leonard's desire to proceed because he was satisfied with the jury was equally as reasonable a decision as requesting a mistrial under the circumstances. Therefore, it would *not* have been reasonable for counsel to insist on a mistrial despite her client's wishes to the contrary. Leonard's claim fails for this reason as well, and this Court should affirm.

2. LEONARD CANNOT SHOW EITHER THAT HIS ATTORNEY'S PERFORMANCE WAS DEFICIENT OR THAT HE SUFFERED PREJUDICE.

In a related claim, Leonard contends that he received ineffective assistance of counsel because his attorney allowed him to make the decision not to ask for a mistrial. More specifically, Leonard claims that his attorney's performance was deficient because she deferred to his preference on a matter of legal strategy, and that he suffered prejudice because the decision "to forgo a mistrial resulted in a trial poisoned by irretrievably damaging propensity evidence." Brief of Appellant, at 29-34. This claim should also be rejected.

As mentioned previously, the decision not to request a mistrial in order to keep a jury with which Leonard was satisfied was an entirely reasonable one. Therefore, although requesting a mistrial also would have been a reasonable strategy, Leonard cannot show that his attorney's performance was deficient because she did not insist on a mistrial against his express wishes. Moreover, contrary to what Leonard now argues, the evidence against him was very strong, and included Leonard's highly incriminating letters and telephone calls from the jail in which he repeatedly urged key witnesses to lie for him or abduct the victim.

Thus, there is no reasonable probability that the outcome of the trial would have been different if a mistrial had been granted and the trial had begun anew. Leonard cannot sustain his claim of ineffective assistance of counsel, and this Court should affirm.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v.

McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. As the United States Supreme Court has warned, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and to judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging counsel's performance, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes the presumption that challenged actions were the result of a reasonable trial strategy. Strickland,

466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). In any given case, effective representation may be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In this case, Leonard argues that his counsel's performance was deficient because she did not insist on a mistrial. But this Court has recognized that there are numerous tactical reasons not to request a mistrial, even if one may be warranted:

Like omitting cross-examination, there may, indeed, be sound tactical reasons not to request a mistrial even when the defendant is entitled thereto. The State's case may have weaknesses that the State could cure in the event of a retrial, or defense counsel may think the prosecuting attorney's misconduct might backfire and actually operate to the defendant's advantage.

State v. Dickerson, 69 Wn. App. 744, 850 P.2d 1366, rev. denied, 122 Wn.2d 1013 (1993). Here, there were other sound tactical reasons why Leonard's attorney did not insist on a mistrial in spite of Leonard's desire to proceed.

First, and most obviously, Leonard stated that he wanted to proceed because he was satisfied with the jury that had been selected. RP (3/30/09) 23. Particularly in a case such as this one

where the defendant will be testifying in his own defense, this is a completely valid reason to forego a mistrial. In fact, given the evidence in this case, the decision to proceed because the defendant feels comfortable with the jury is at least equally as reasonable as the decision to dismiss that jury and start over. Secondly, Leonard's counsel may well have been concerned that causing strife in her relationship with Leonard by insisting on a mistrial against his wishes was not worth the minimal benefit involved. Maintaining a good working relationship with a client by deferring to his reasonable preference to proceed is a valid reason to forego a mistrial as well. And third, Leonard's counsel was undoubtedly aware of the evidence that would be admitted aside from any evidence that Leonard had been a pimp in the past. As will be discussed further below, the other evidence was very strong, and included Leonard's own highly incriminating statements in phone calls and letters to key witnesses. On balance, it was an entirely sound tactical decision not to request a mistrial in this case.

Nonetheless, Leonard argues that it is per se deficient performance to defer to a client's wishes on a matter of strategy because such matters are addressed to the judgment of trial counsel. See Brief of Appellant, at 30. Although it is true that the final decision

rests with counsel, Leonard cannot demonstrate that a decision to defer to the defendant's preference in these circumstances was, in itself, an unsound tactical decision. Thus, Leonard has not met his burden of demonstrating that counsel's performance was deficient. His claim should be rejected on this basis alone.

But in addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must also affirmatively show material prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a mere showing that an error by counsel had some conceivable effect on the outcome of the trial. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Therefore, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Strickland, 466 U.S. at 694. Leonard cannot meet that standard in this case.

Despite Leonard's arguments to the contrary, the evidence against him was very strong. C.V.'s testimony was corroborated substantially by other evidence, including the fact that her panties and a blanket covered in Leonard's semen were found in the shed. By contrast, Leonard's testimony was simply incredible. But perhaps

most damaging of all were Leonard's statements in letters and phone calls in which he, among other things, repeatedly asked Pederson and K.F. to lie for him and tamper with evidence and witnesses, suggested to Pederson that she should abduct C.V., and suggested that C.V. should stay with his friend Marcus, who would have put her to work in prostitution. Ex. 46, 47, 67-73. Indeed, as the trial court observed at sentencing, this case could have been considerably more difficult for the State if Leonard had "not been so talkative over the phone where every time it said this call was being recorded, [and] had [he] not written so many letters[.]" RP (5/1/09) 15. In light of the other evidence, the effect of Pederson's and J.K.'s testimony that Leonard was a pimp was minimal at best. Therefore, Leonard cannot demonstrate a reasonable probability that the outcome of the trial would have been different if his attorney had insisted on a mistrial.

In sum, Leonard cannot meet his burden of showing either a deficient performance by his attorney or prejudice resulting from that performance. His ineffective assistance of counsel claim fails.

D. CONCLUSION

For all of the reasons stated above, this Court should reject Leonard's claims on appeal and affirm his convictions for two

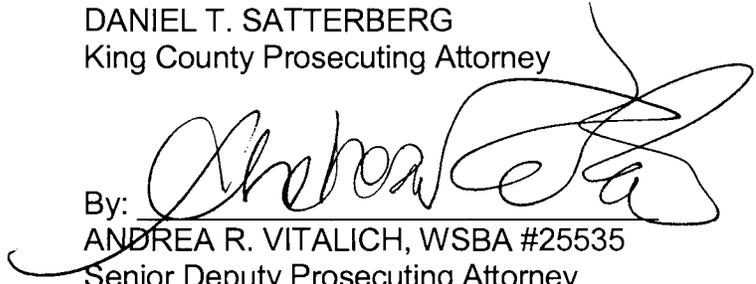
counts of rape of a child in the second degree and one count of promoting commercial sexual abuse of a minor.

DATED this 18th day of December, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:

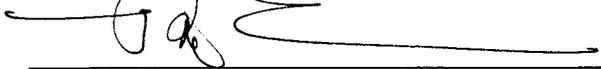


ANDREA R. VITALICH, WSBA #25535
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. STEVEN LEONARD, Cause No. 63476-3-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

12-18-2009
Date

