

No. 64513-7-I

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

Snohomish County No. 09-1-00359-3

STATE OF WASHINGTON,

Respondent,

v.

DAVID MITCHELL,

Appellant.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The court erred in denying Defendant's Motion for Arrest of Judgment.

2. The court erred in denying Defendant's Motion for a New Trial.

3. There was insufficient evidence to establish a *prima facie* case on the charge of Voyeurism.

4. Defense counsel was ineffective in failing to adequately cross-examine the complaining witness with regard to her drug usage at the time of the incident and otherwise laying a foundation for the defense expert.

5. Defense counsel was ineffective in failing to notify the State of the defense's expert witness on the issue of the effects of complainant's drug usage on her perception, memory and credibility.

B. Issues Pertaining to Assignment of Error

1. Whether there was sufficient evidence to establish a *prima facie* case of Voyeurism, where there was no evidence that the Defendant actually looked at the complainant? (Assignments of Error #1 and #3)

2. Whether there was sufficient evidence to establish a *prima facie* case of Voyeurism, where the statute requires a view “for more than a brief period of time,” and where there was no evidence as to the length of time that a view took place? (Assignments of Error #1 and #3)

3. Whether there was sufficient evidence to establish a *prima facie* case of Voyeurism, where the State is required to prove that a view is more than “casual or cursory,” and there was no evidence to show that a view had even taken place, for what length of time or how it was accomplished? (Assignments of Error #1 and #3)

4. Whether there was sufficient evidence to establish a *prima facie* case of Voyeurism, where the statute requires that the person is acting to gratify sexual desires and there was no evidence to support this element? (Assignments of Error #1 and #3)

5. Whether defense counsel provided adequate assistance where he failed to cross-examine the complainant regarding details of her narcotics drug use on the date of the incident, including her dosage, the frequency with which she used drugs, the effect of these drugs on her perception, the length of time she was using each particular drug and other related questions? (Assignments of Error #2, #4 and #5)

6. Whether there was ineffective assistance of counsel where defense counsel failed to notify the State pursuant to CrR 4.7 that he

intended to call an expert witness to testify on the effects of narcotic drugs on the ability to perceive? (Assignments of Error #2, #4 and #5)

II. STATEMENT OF CASE

Defendant David Mitchell was charged on February 26, 2009 in a one-count Information with the crime of Voyeurism on January 5, 2009. CP 101-102. The case proceeded to trial before the Honorable Ronald Castleberry, sitting with a jury. On July 8, 2009, the jury returned a verdict of guilty to the crime of voyeurism. CP 63-64.

Following the verdict, new counsel substituted for trial counsel. On September 14, 2009 Defendant Mitchell filed his Motion for Arrest of Judgment and for a New Trial. CP 43-62. Following a hearing on September 28, 2009, the Court denied the motions. CP 18.

The Defendant was sentenced on October 27, 2009. CP 3-17. The Notice of Appeal was timely filed.

III. FACTS OF THE CASE

The alleged victim in this case, Ms. Julie Hummer, went to the Sun Deck Tanning Salon almost everyday. RP 12.¹ The salon has six tanning rooms and each individual tanning room contains a tanning bed, an area to change, a chair, a fan and a mirror. RP 37-38. The beds are controlled by an employee, sitting in the lobby, who uses a panel to direct how long the

bed operates based on the customer's desired tanning time. RP 44. The rooms have walls that are eight feet high separating them. The walls do not extend to the ceiling. RP 112.

On the day of the alleged incident, January 5, 2009, Ms. Hummer arrived at the tanning salon at approximately 4:30 to 5:00 p.m. RP 13. Ms. Hummer was accompanied by her roommate, who also was placed in a tanning room. RP 13-14. Ms. Hummer was not aware of which other rooms were in use at the time she started tanning. RP 14. Upon entering her assigned room, she disrobed, applied tanning lotion and climbed into the "clam shell" like tanning bed and tanned for 15-20 minutes. RP 15. Ms. Hummer did not use eye protection when tanning. RP 31.

Once the bed turned off, Ms. Hummer got out of the bed, wiped the sweat off her body and went to put on her clothes. RP 15. As she was starting to dress, something caught her attention. She explains that she did not know what made her look up but she "saw the top of someone's head." RP 16. She quickly got dressed, left the room and reported this to the employee at the front desk. RP 16.

Ms. Hummer did not recall why she looked up at the time. RP 25. She never saw the person's eyes. RP 26. When asked how long she thought she saw the person's forehead she replied: "Quickly. I don't

¹ RP refers to the page of the Report of Proceeding prepared in this case.

know. I can't tell you how quick. It was dropping." RP 26. She agrees that she asked the employee at the desk, whose name was Stephanie, whether the person in the other room was "a guy or a girl." RP 27-28.

The police were called and arrested Mr. Mitchell as he was coming out of his tanning room. RP 58. He cooperated with the officers and when told the reason for which he was being arrested denied that he looked over the wall. RP 78-79; 108.

After David Mitchell was arrested and placed in handcuffs, Ms. Hummer had an opportunity to view him. RP 29-30. She identified him as the person who was looking over the wall. RP 77. However, Ms. Hummer had not given a physical description of the suspect to either the employee of the tanning salon or the investigating officers prior to making her in-person identification. RP 77. Prior to making the identification, she was not sure if the person whose forehead she saw was a man or a woman. RP 16-17.

Ms. Stephanie Buell, the employee at the tanning salon on the day in question, testified that there was no one else in the salon when David Mitchell arrived and was placed in his tanning room. RP 35. The alleged victim, Ms. Hummer, arrived after he was in his room and placed in an adjoining room. RP 35-37. A friend of Ms. Hummer, who arrived with her, was placed in a third room. RP 37. Therefore, Mr. Mitchell was in

his own room several minutes before Ms. Hummer came into the tanning salon. RP 40.

At the time of this incident, Ms. Hummer was taking narcotics for her chronic hip pain. The narcotics she took included Methadone, OxyContin and OxyCodone. RP 24; 28. Her dosage of Methadone was increased between the incident and trial. RP 25. She had been taking these medications, which she agrees were “pretty strong painkillers,” for six or seven years for hip pain. RP 28. She claims that the only limitation while taking these pain killers was that she was not supposed to drink alcohol. RP 28.

IV. THERE WAS INSUFFICIENT EVIDENCE TO TAKE THE CASE TO THE JURY AND THE CASE SHOULD BE DISMISSED

A. Sufficiency of Evidence Standard

The Due Process Clause of the United States Constitution, as well as parallel clauses under the State Constitution, require that there be sufficient evidence in the record to support a finding of guilt beyond a reasonable doubt. The Court held in *Jackson v. Virginia*, 443 U.S. 307 (1979), that the relevant question on sufficiency of the evidence:

is whether, after reviewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Emphasis in original.)

Id. at 319. The Washington Supreme Court adopted this standard in *State v. Green*, 94 Wn.2d 216 (1980).

A sufficiency of evidence challenge may be raised for the first time on appeal. *State v. Baeza*, 100 Wn.2d 487, 488 (1983).²

B. Relevant Statutes

Defendant David Mitchell was charged and convicted of the crime of voyeurism, RCW 9A.44.115(2), which statute provides in its relevant portion that:

A person commits the crime of voyeurism if, **for the purpose of arousing or gratifying the sexual desire of any person, he** or she knowingly **views**, photographs, or films:

(a) another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) the intimate areas of another person without that person's knowledge and consent and under circumstances where that person has a reasonable expectation of privacy in a public or private place. (Emphasis added.)

The element "Views" is defined in RCW 9A.44.115(1)(e):

"Views" means the intentional looking upon of another person **for more than a brief period of time, in other than a casual or cursory manner**, with the unaided eye or with a device designed or intended to improve visual acuity. (Emphasis added.)

² A sufficiency of evidence challenge was raised in Defendant Mitchell's Motion for Arrest of Judgment and for New Trial. CP 39.

C. There was Insufficient Evidence to Establish the Critical Elements of the Crime of Voyeurism

1. There was no evidence presented that the defendant viewed the “victim”

One of the key elements of voyeurism statute is the requirement that a person views another. This element is statutorily defined as:

“Views” means the intentional looking upon of another person **for more than a brief period of time**, and other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

RCW 9A.44.115(e).

In the instant case, the record is devoid of any evidence that the Defendant actually saw Ms. Hummer. Instead, the evidence is that Ms. Hummer saw a person’s forehead, which quickly dropped out of sight. As such, there was no evidence that Defendant David Mitchell actually looked at Ms. Hummer and a crucial element of the crime was absent.

2. There was no evidence in the record that the defendant viewed the “victim” for longer than a brief period of time or that the view was for the purpose of gratifying the sexual desires of any person

Furthermore, the statutory definition of “views” requires proof that the viewing of another person lasted “for more than a brief period of time. . . .” Even if we assume, *arguendo*, that Defendant looked over the wall and saw Ms. Hummer, there was no evidence that such a viewing occurred

“for **more** than a brief period of time.” *Id.* Since Ms. Hummer never even actually saw anyone looking at her, the record was devoid of evidence that any alleged viewing lasted for a long enough period to satisfy the time requirement.³

The same is likewise true of the element in the statute that such viewing had to be done for “the purpose of arousing or gratifying the sexual desires of any person.” Since there was no evidence of a view, or a view for more than a brief period, it seems obvious that there was no evidence presented from which the jury could find that such a view was done for the purpose of gratifying the sexual desires of any person.

Even assuming, *arguendo*, that a defendant actually climbed up on a chair in order to peer over a wall, as was the State’s theory, there are reasons other than sexual gratification why a person might do this. One is that the person may have thought that someone he knew was in the next booth. Another reason is that the person may have just been curious as to who was there. A third reason is that the person may have just wanted to pull a prank on someone. There was no evidence that the Defendant knew there was a female in the next room, in that he entered his room prior to her arrival. RP 35-37. Since Ms. Hummer never saw anything except a

³ The phrase “for more than a brief period of time” is not further defined by statute. Since this is a criminal statute, the rule of lenity requires that any term in a statute that

forehead for a quick moment, there was no basis for a jury to find that any “view” was for a sexual purpose.

Moreover, unlike some other crimes where the Legislature has provided the State with a permissive burden shifting inference, such as in a burglary case where RCW 9A.52.040 “Inference of Intent” allows a jury to find that a person found unlawfully in a building was intending to commit a crime; or RCW 9A.04.110(12) “Malice—Definition” which allows an inference of malice from an act done in willful disregard to the rights of another; no such statutory or judicial inference assists the State in establishing a *prima facie* case in a voyeurism prosecution. Instead, the State has to prove every element beyond a reasonable doubt without resort or any assistance from a permissive inference. *In re Winship*, 397 U.S. 358 (1970). Likewise, a court cannot construe a statute in a manner that makes any portion of it superfluous. *Doty v. Town of South Prairie*, 122 Wn.App. 333, 338 (2004).

A review of voyeurism cases where Washington courts have held that evidence was sufficient demonstrates the obvious lack of evidence in the record in the instant case. For example, in *State v. Diaz-Flores*, 148 Wn.App. 911 (2009), a defendant was convicted of voyeurism after he was seen by police officers peering into an apartment window with his

might be considered to be ambiguous be interpreted in favor of the accused. *In re*

hands inside his unzipped pants, rocking back and forth as if he were masturbating himself, while looking through a crack in the drawn blinds where a couple was having sexual intercourse. The Court found that the State had met its burden of proving that the act was for the purpose of sexual arousal or gratification based on the testimony of the officer that the defendant's hands were in his crotch area and it appeared he had an erection and "there was no evidence to suggest another purpose than sexual gratification." *Id.* at 919-920.

There was also evidence that the defendant in the *Diaz-Flores* case viewed his victim "for more than a brief period of time" in that he told police that he was looking for friends, but once he saw the couple having sex "he continued to watch through the window." *Id.* at 920, n. 3.

Another example of sufficiency of evidence on the issue of sexual arousal or gratification is found in *State v. Glas*, 106 Wn.App. 895 (2001).⁴ In *Glas*, the defendant took pictures under the skirts of two women while they were walking in a public mall, but claimed among other things that the State had not proven the sexual gratification requirement. However, Mr. Glas gave a statement at the time of his arrest "that the photographs were ultimately designed for a pornographic internet

Stenson, 153 Wn.2d 137, 149 n. 7 (2004).

⁴ *Glas* was reversed on other grounds. *See: State v. Glas*, 147 Wn.2d 410 (2002).

website,” which the Court found was evidence which satisfied the sexual gratification requirement.

The issue of the sufficiency of the evidence on the element of the length of the viewing was analyzed in *State v. Fleming*, 137 Wn.App. 645 (2007). There the majority opinion held that there was sufficient evidence to support a conviction for voyeurism where the female victim testified that while using a stall in a restroom, the defendant entered a stall next to hers and when she looked up she saw him staring at her over the top of the stall and sticking out his tongue at her. *Id.* at 647. The Court found that the evidence was sufficient to prove a viewing of “more than a brief period of time”:

the jury could find as well that he viewed her for “more than a brief period of time.” Ms. Hone had enough time to see Mr. Fleming looking at her, to yell at him, to tell him she had a cell phone, and to run out of the stall. He in turn had enough time to stare and stick his tongue out at her. The evidence was indeed sufficient to support a conviction.

Id. at 648. Unlike *Fleming*, in the instant case, evidence was lacking showing that the Defendant viewed the victim at all, let alone for “more than a brief period of time” as required by the statute.

Fleming was a split decision in that acting Chief Judge Schultheis wrote in his dissent that there was insufficient evidence to prove that the view was longer than a brief period of time. In his dissent, he wrote that

the element “more than a brief period of time” was ambiguous and susceptible to more than one meaning and must therefore be strictly construed against the State and in favor of the defendant. Nevertheless, even viewing the State’s evidence most favorably to it, he wrote that the acts of the defendant staring down at the victim on the toilet and sticking out his tongue were insufficient to satisfy the time requirement:

Construing the statute’s language in favor of Mr. Fleming, the rule of lenity requires us to interpret the phrase “more than a brief period of time” as contemplating more than the brief encounter established by the State here. Accordingly, I would reverse the conviction and dismiss the charge against Mr. Fleming.

137 Wn.App. at 649.

Importantly, under either the majority or dissenting opinions’ analyses in the *Fleming* case, the evidence in the instant case would be insufficient.

The only other published voyeurism case dealing with sufficiency of the evidence that Defendant could locate was *State v. Stevenson*, 128 Wn.App. 179 (2005) where a father admitted to the police that he watched his daughter shower, intending to masturbate. Nevertheless, the defendant argued that the evidence was insufficient because it proved no more than an attempt to commit the crime of voyeurism. Being a bench trial, the defendant had to challenge the trial court’s findings of fact, which

included findings that he viewed his daughter's breast through a t-shirt, which made him sexually aroused and that he also became sexually aroused when he viewed his daughter in a shower, although he could only see her arm and elbow. The trial court held that there was sufficient evidence based on his own statement that he acted for the purpose of sexual gratification, in that he admitted this to the police at the time. Furthermore, he admitted that he watched his daughter in the shower for 10 to 20 seconds. The trial court's findings that there was sufficient evidence to establish the elements of the crime that the defendant viewed his daughter for the purpose of sexual gratification, without her knowledge or consent, in a place where she had a reasonable expectation of privacy for more than a brief period of time, were upheld. *Id.* at 195.

An examination of all the published cases on these issues establishes that there was insufficient evidence on material elements of the offense. Contrary to these cases, here there was absolutely no evidence that any viewing occurred, that even if a viewing did occur that it was long enough to satisfy the time requirement in the statute and further that any viewing was for the purpose of sexual gratification.

V. **THIS COURT SHOULD REVERSE AND ORDER A NEW TRIAL BECAUSE OF INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL**

A. **Defendant Mitchell Filed His Motion and Supporting Memorandum for Arrest of Judgment and for a New Trial Along with the Supporting Sworn Statements of Attorney David Allen and Dr. Robert Julien**⁵

The Motion for a New Trial was based on the claim that the trial attorney failed to provide adequate assistance in that he did not adequately prepare for the cross-examination of the complainant, Ms. Hummer; did not adequately cross-examine her; did not present sufficient grounds for the admission of expert testimony on the effect of narcotic drugs on the complaining witness; and did not disclose the subject of the expert's testimony. The Motion included a sworn statement by Dr. Robert Julien as to the effects of the medications that Ms. Hummer was using and how they would cause "mental" clouding which would affect her perception, judgment and information processing. CP 35-39. The Court heard and denied this Motion. CP 18.

⁵ See: CP 43-62; 40-42; 35-39.

B. Defendant Mitchell Received Defective Legal Representation, in Violation of the Sixth Amendment Right to Effective Assistance of Counsel

1. Facts regarding use of drugs by “victim”

Prior to Ms. Hummer testifying, the Court reserved on the issue of whether the defense would have the opportunity to inquire of Ms. Hummer as to whether she had taken narcotic prescription drugs at the time of the incident. RP 6. Based on this, the prosecution decided to bring out on direct that she was taking narcotic medications at the time of the incident.

On direct examination, Ms. Hummer was asked by the prosecution if she was taking medications that were “narcotic in nature.” She responded affirmatively and explained that she had chronic hip pain and started taking these medications about “six or seven years ago.” RP 17. She was further asked whether she was taking medications as “she sits here today in court” and she responded affirmatively. As far as change in the medication dosage or frequency she explained that she was taking more methadone now than she usually took. RP 25.

On cross-examination on the issue of drug usage, the defense only asked her what medications she was taking and she responded that she was on methadone, OxyContin and OxyCodone and in response to a question stated that she was not limited by her physician in participating in any

activities except for drinking.⁶ She did agree that these were strong painkillers that she had been on for a long time. RP 28.

There were no other questions regarding the dosage, frequency of usage, the length of time she had used each of the drugs or the effect these drugs had on her perception.

2. **Defense counsel's cross-examination and his efforts to present expert testimony were inadequate and constituted ineffective assistance of counsel**

In the instant case, after the prosecutor brought out very limited information about the complainant's use of narcotic drugs, the defense attorney's cross-examination was totally inadequate. The defense attorney did not inquire as to the dosage, frequency or length of time the complainant was taking each these drugs. He did not inquire as to whether the complainant was following doctor's orders in terms of her use of drugs. He did not inquire as to why it was necessary for the complainant to take a narcotic drug combination for 6 to 7 years. He did not question her as to whether these drugs affected her perception.

For some unknown reason, defense counsel indicated in his offer of proof that while his expert on drugs, Dr. Wardle, who has prescribed OxyCodone in his practice, and "knows what methadone is and how it's

⁶ Ms. Hummer's explanation that her only limitation was to not drink while using these medications was contradicted by Dr. Wardle and Dr. Julien, to be discussed *infra*.

used,” would not be testifying regarding Methadone. RP 29-30. While the offer of proof indicated that the doctor did not prescribe OxyContin because of its effects, he was aware of the “side-effects as stated in the PDR of both of those kind of drugs,” and how they affect people generally. RP 130. The State objected that the doctor did not have the necessary information to testify how those drugs affected Ms. Hummer, the victim. RP 130.

The trial court noted that the defense attorney had only identified the doctor as an expert who was going to testify as to the Defendant’s physical condition and limitations with regard to climbing up on a chair as opposed to testifying as to the side-effects of various drugs. RP 132-133. The judge stated that while Ms. Hummer refused to discuss drugs during the defense interview, the defense “should have brought a motion prior to trial in terms of saying we want to compel Julie Hummer to tell us what drugs she’s under.” The court commented that defense counsel should not have waited until the time of trial and instead utilized procedures to obtain the information earlier and therefore noted that “so you’re in your own box of your own making.” Had the defense done its work, this would have furthermore permitted the prosecutor to have notice and bring in the treating physician to contradict the defense expert. RP 133.

The court further stated that:

based upon the proffer that I'm hearing, he doesn't know anything about the dosage of these drugs, he doesn't know how long she's been on these drugs. He doesn't know under what circumstances they're being prescribed. And I don't know if his testimony about the general effect of these drugs would be affected by that type of inquiry. And I'm bothered by having him just get up and say, well, in general here are the side effects and then letting him go at that.

Pages 133-134.

At that point the court allowed defense counsel to call the doctor and make an offer of proof outside the presence of the jury.

Consistent with the offer of proof, Dr. Wardle, a foot and ankle surgeon, testified that while he prescribed OxyCodone he did not prescribe OxyContin because of problems with abuse. As far as side effects of OxyCodone and OxyContin, he testified that they can affect a person's coherence in that it is a depressant similar to alcohol. RP 135-136. Contrary to Ms. Hummer's testimony that there was no limitations other than drinking, Dr. Wardle opined that patients who use these medications are warned that they are not to utilize machinery or drive automobiles. RP 136.

On cross-examination he testified that although he is not a chronic pain specialist, he is aware of how chronic pain is managed. RP 138-139. While he does not prescribe OxyContin himself, he has a partner and associates who use that medication. RP 139.

Based on this offer of proof, the court ruled that the doctor could not testify before the jury as to the side-effects of these drugs. RP 142. Because the defense did not bring out evidence about Ms. Hummer's dosage, quantity, whether tolerance has been built up, and whether or not the doctor has ever seen these side-effects on patients, there was a lack of foundation. Moreover, Dr. Wardle was not previously identified by the defense, who made no prior motions to compel Ms. Hummer to provide this information. Therefore, the State was put at a disadvantage by not having notice and the court excluded the doctor's testimony as to the effects of drugs. RP 143.⁷

Dr. Wardle was certainly qualified to testify. He was a medical doctor practicing in the State of Washington and a foot and ankle surgeon and regularly prescribed narcotic medication for pain control. A medical doctor in Washington can testify regarding any medical subject, even where the doctor is not a specialist in that field. Tegland, Evidence (5th Ed.), 5B Wash. Prac. § 702.9, p. 52-53.

The Motion for Arrest of Judgment and a New Trial was supplemented by the Sworn Statement of Dr. Robert Julien an anesthesiologist and pharmacologist. It stated that OxyCodone,

⁷ Although the doctor would be allowed to testify regarding the Defendant's physical problems, which may have prevented him from climbing up on a chair to look over the wall.

OxyContin and Methadone are “potent opiate narcotics” and produce “profound psychological effects” that include “relief from pain, altered perception, sedation, relief from anxiety, cognitive slowing, apathy, complacency, and reduced mentation.” In essence, this is a state of “mental clouding.” He further stated that these drugs will impair one’s judgment, perception and information processing. *See* Julien Sworn Statement, CP 35-39, ¶ 7. Further, these drugs work “synergistically and exhibit additive effects (pain-relieving) and intensity of side effects (the mental clouding, described above).” *Id.*, ¶ 8. He also wrote that people who are impaired by these drugs can appear normal even at levels known to cause substantial psychomotor impairment. Although they may appear to function quite well, they will have a degree of mental clouding and impaired psychomotor functioning, including perception. *Id.*, ¶ 11.

While Dr. Julien stated it would be best to know the dosage, frequency, the length of time they have taken these drugs, a history of medication increases and other information, he writes:

Even without this information, I can still say that a person taking methadone, oxycontin and oxycodone on a daily basis would most likely be impaired in the sense that they should not operate a motor vehicle, operate machinery, or perform actions that involved psychomotor integrity and perception.

Id., ¶ 13.

3. Legal principles

The Sixth Amendment guarantees the right to the effective assistance of counsel. *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show (1) that trial counsel's performance was defective; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The measure of attorney performance is one of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. Reasonable tactical choices do not constitute deficient performance. *Id.* at 689. Decisions based on inadequate trial preparation, inadequate factual investigation or inadequate legal research are not tactical choices. *See, e.g., In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (counsel ineffective for failing to prepare for trial); *In re Hubert*, 138 Wn.App. 924 (2007) (attorney's failure to realize that there was a statutory defense to second degree rape where the defendant believed the complainant was not incapacitated, constituted ineffective assistance).

To prevail, David Mitchell must only establish that there was a reasonable probability that, absent counsel's deficiencies, the outcome of the

trial might well have been different. *Strickland, supra* at 695. The “ultimate focus of inquiry must be on fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696.

C. **Case Law is Clear that a Defendant has Great Latitude in Cross-Examining the Key Prosecution Witness in a Case**

In *Pointer v. Texas*, 380 U.S. 400, 404-405 (1965) a unanimous Supreme Court held that the confrontation clause was applicable to the states and, quoting from prior cases, explained that:

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.

Similarly, in *California v. Green*, 399 U.S. 149, 158 (1970) the court identified how the confrontation clause and cross-examination advanced the pursuit of truth, noting that “forcing the witness to submit to cross-examination is the ‘**greatest legal engine ever invented for the discovery of the truth . . .**’” (emphasis added). Cross-examination and confrontation permits the jury to decide the defendant’s fate by observing the demeanor of a witness, aiding the jury in assessing credibility and also impressing upon a witness the seriousness of the matter and the possibility of a penalty for perjury. *Pointer, supra* at 405.

Washington cases are in agreement. For example, in *State v. Roberts*, 25 Wn.App. 830, 834 (1980), the court reasoned that a “witnesses’ credibility or motive must be subject to close scrutiny,” especially “where a case stands or falls on the jury’s belief or disbelief of essentially one witness.” *See also State v. Kilgore*, 107 Wn.App. 160, 184-185, 36 P.3d 308 (2001) (“Courts should zealously guard this right and allow a defendant great latitude to expose a witness’ bias, prejudice, or interest”); *State v. Parris*, 98 Wn.2d 140, 144 (1982) (“The purpose of such confrontation is to test the perception, memory and credibility of witnesses. Also, it serves the purpose of testing the witness’ narrative powers”).

In *State v. Johnson*, 90 Wn.App. 54, 69 (1998), the Court of Appeals, citing *Davis v. Alaska*, 415 U.S. 308 (1974), again recognized the constitutional dimensions of the right to cross-examination:

Thus, any error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. [Internal citations omitted.]

Moreover, the right to confrontation and cross-examination is even broader with a critical witness because:

the more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore

fundamental elements, such as motive, bias, credibility, or foundational matters.

State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002), citing *State v. Dickenson*, 48 Wn.App. 457, 466 (1987).

The threshold to admit such relevant evidence is “very low.” Even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621 (2002) (confrontation clause error to limit cross-examination of police eyewitness to drug delivery). See: *State v. Peterson*, 2 Wn.App. 464 (1970); *State v. McDaniel*, 83 Wn.App. 179 (1996) (confrontation clause rights violated in assault case by excluding evidence of victim’s false testimony in civil case about drug use); *State v. Roberts*, *supra* (emphasized the importance of cross-examination in sex offense cases).

ER 403 provides for a balancing of the probative versus prejudicial effect of evidence. While balancing is appropriate in many situations, especially where evidence is brought in against the defendant under ER 404(b), a different test is utilized when the State claims prejudice to the complaining witness:

The balancing process should focus not on potential prejudice and embarrassment of the complaining witness, but instead should look to potential prejudice to truth finding process itself.

State v. Hudlow, 99 Wn.2d 1, 13 (1983). However, where a witness is crucial to the prosecution, an ER 403 analysis should not be undertaken

with regard to scope of cross-examination. *See: State v. Darden, supra*, (limitation on cross-examination of police witness to drug delivery violated confrontation clause); *State v. McDaniel*, 83 Wn.App. 179 (1996) (confrontation clause violation in assault case to exclude evidence of victim's prior false testimony in a civil proceeding, no valid State's interest in excluding such evidence); *State v. Howard*, 52 Wn.App. 12, 25 (1988) (ER 403 not applicable where evidence is essential to defense). *State v. McSorley*, 128 Wn.App. 598, 613-614 (2005) (error to prohibit the defense from establishing that the victim in child luring case had previously engaged in "pranks" of gesturing wildly for passing cars and faking a bike accident until a car stopped, in that victim was a "crucial" witness, and his prior pranks were highly probative of his credibility, and it was an abuse of discretion to exclude them under an ER 403 analysis).

D. Defense Attorney's Failure to Adequately Cross-Examine the Complainant Regarding Her Drug Use which had the Effect of Excluding Expert Testimony on the Perceptual Abilities of Users of these Drugs was Ineffective Assistance

In *State v. Brown*, 48 Wn.App. 654, 660 (1987), the trial court erroneously excluded evidence that a rape complainant had used LSD on the evening in question on the ground that it was too prejudicial, which was reversed by the Court of Appeals, explaining:

Here, the Superior Court engaged in a balancing process under ER 403 and determined the evidence was inadmissible because its prejudicial affect to the truth finding process outweighed its probative value. . . . **However, ER 403 does not extend to the exclusion of crucial evidence relative to the central contention of a valid defense.** 5 K. Tegland at 246 n. 3 (citing *United States v. Wasman*, 641 F.2d 326 (5th Cir. 1981)). [Emphasis added.]

Id.

Moreover, it was error in *Brown* for the Court to exclude the testimony of the Defendant's expert witness who would have provided general testimony in order to evaluate the drugs' effect on the complaining witness's perceptions. *Id.* at 661.

In the instant case, the trial judge rejected the offer of proof on the expert testimony of Dr. Wardle because the defense did not adequately cross-examine the complainant about her drug use and therefore did not establish a foundation by which Dr. Wardle could testify. Moreover, the defense failed to notify the State pursuant to CrR 4.7(b) and excluded testimony from Dr. Wardle on the issue of the complainant's drug use.

E. **There is a Reasonable Probability that, Absent Defense Counsel's Failure to Adequately Cross-Examine, and Also His Failure to Adequately Present an Expert Witness, the Outcome of the Trial Would Have Been Different**

Defendant Mitchell has met the requirements set forth in *Strickland v. Washington*, *supra*, by showing that there was a reasonable

probability, but for the deficient performance of defense counsel, that the outcome of the proceedings would have been different. Ms. Hummer was the key prosecution witness. She did not wear eye protection while in the tanning “clam shell” apparatus, which would have presumably affected her eyesight. RP 30. She only had an opportunity to have a brief glance at the person’s forehead as it was dropping down below the level of the wall partition. As evidenced by the fact that she asked “girl at the desk, Stefani, if that was the head of a guy or a girl in bed 3,” it was clear that her supposed view of the person was at best no more than a fleeting glance. RP 21-22.

Had Dr. Wardle or some other competent expert been able to testify, the jury would have learned that these drugs would have had a substantial effect on the accuracy of Ms. Hummer’s testimony and her ability to perceive the situation. It would have also been important for the jury to know that a person who is affected by these narcotic drugs does not necessarily show signs as one who is affected by alcohol. The jury would have therefore had sufficient tools to question Ms. Hummer’s credibility as to the accuracy of her testimony.

Minimally, defense counsel should have brought a motion before the Court prior to trial requesting an order directing Ms. Hummer to provide information regarding her narcotic usage. Defense counsel should

have notified the State pursuant to CrR 4.7 and briefed this prior to trial so the Court would have been on notice as to the issue. Defense Counsel should have adequately cross-examined Ms. Hummer about the dosage, frequency, length of time she has used these drugs, what combination of these drugs she took on the date of the incident and how they affected her. He should have also been prepared to cross-examine her on limitations on driving that are placed on users of these drugs. Defense counsel's failure to do so constituted ineffective assistance of counsel.

Based on the foregoing, the Court should hold that the Defendant did not receive adequate assistance of counsel and reverse the conviction and grant him a new trial.

VI. CONCLUSION

For the reasons stated, this Court should dismiss the charge on the basis of insufficiency of evidence, or, alternatively, grant a new trial on the ground of ineffective assistance of counsel.

RESPECTFULLY SUBMITTED this 14th day of May, 2010.

A handwritten signature in black ink, appearing to read 'D. Allen', with a long horizontal line extending to the right from the end of the signature.

DAVID ALLEN, WSBA #500
Attorney for Appellant

PROOF OF SERVICE

David Allen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 14th day of May, 2010, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Seth Fine, Esq.
Snohomish County Prosecutor's Office
3000 Rockefeller Ave.
Everett, WA 98201

And mailed to Appellant:

David Mitchell

DATED at Seattle, Washington this 14th day of May, 2010.



DAVID ALLEN, WSBA #500
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