

NO. 36836-6 II

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

STATE OF WASHINGTON, Respondent

v.

KEITH LATIMER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-01832-0

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DIVISION II
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of the facts set forth by the defendant.

II. RESPONSE TO ASSAIGNMENT OF ERROR NUMBER 1

The assignment of error raised in this Appeal is a claim of ineffective assistance of counsel. The claim is based on a failure to object to the admission of evidence and a failure to object to a non-responsive answer given by one of the witnesses that showed her opinion that the defendant was guilty.

In reviewing a claim of ineffective assistance of counsel, even deficient performance by a counsel “does not warrant setting aside the Judgment of a criminal proceeding if the error had no effect on the Judgment.” Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” Strickland, 466 U.S. at 693. “In doing so, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome.” State v. Crawford, 159 Wn.2d 86, 99 – 100, 147 P.3d 1288 (2006). The reasonableness of trial counsels performance is reviewed in light of all of the circumstances of the case at the time of counsels’ conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

The first claim of error is that the defense attorney did not object to the admission of exhibit 2 which was a picture of the complaining witness when she was approximately 8 years of age. At the time that the State offered number 2 it also offered two other photographs of the child taken around the same time. Again, there was no objection to any of the three pictures, and, apparently, on Appeal there is no objection to the admission of one or three (RP Volume 3, 54 -56). In fact, when the defense attorney began questioning the child he was referring specifically to these exhibits and discussing with the child the fact that at least one of these pictures may have been taken by the defendant. The defense attorney then went from questions concerning the pictures into a general discussion with the child as to her recollection of where various people were during this time period. For example, he raised concerns and questions about her remembrance of whether or not her grandfather was with them in Salt Lake City. (RP 56 – 58). He was using the evidence to show a faulty memory on the child’s part. Deciding whether and when to object to the

admission of evidence is “a classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). As case law has repeatedly determined, when trial counsels’ actions involve matters of trial tactics, the appellate courts are hesitant to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983). The appellate court will presume that the counsel’s performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel to justify a reversal. Madison, 53 Wn. App. at 763.

The preceding rules would also apply to the other claim of ineffective assistance of counsel lodged in this appeal when the defendant maintains that his counsel did not object to testimony from Tawana Ketchum, the defendant’s ex-girlfriend who gave a non-responsive answer that expressed her opinion that the defendant was guilty of the crime. Specifically, during cross-examination of a State’s rebuttal witness, the defense attorney was asking Tawana Ketchum about possible statements the defendant had made. During the direct examination of this witness the State had elicited the following information:

Q. (Deputy Prosecutor): Was there then a conversation about the issue of Jill Langdon's abuse?

A. (Tawana Ketchum): Yes.

Q. What was the conversation, to the best of your memory?

A. I turned to him and I looked at him and I said - -

Q. I'm sorry, I have to ask you to speak up, I can't hear you.

A. I turned to him and looked at him and I said, you did this to this little girl, didn't you? And he laughed at me, he told me, he said, I'd like to see them prove it.

Q. All right. Was that all the discussion of the accusation of the abuse against Jill Landon that night?

A. Yes.

Q. Did you end your relationship with Mr. Latimer?

A. Yes.

-(RP Volume 4, 176, L.8 - 22)

This then set the stage for the cross-examination of the rebuttal witness. The defense attorney was attempting to show not only that this was not a "confession" but also to show the bias of this particular witness towards the defendant. The questions and answers then were as follows:

Q. (Defense Attorney): And isn't it true that there was an exchange of unpleasantries between you and Mr. Latimer?

A. (Tawana Ketchum): Towards the end.

Q. Okay.

A. I told him I'd see him in court.

Q. Okay. And your relationship was pretty much failed at that time; isn't that correct?

A. It was over.

Q. It was over? Okay. Now, would it be correct to say that when you discussed these allegations with Mr. Latimer, he neither confirmed or denied them?

A. That's not true. He didn't say anything but he had been asleep.

Q. Okay. But the bottom line was, what he said was, I'd like to see them prove it?

A. And laughed. It was funny to him.

Q. Okay. But what he was saying was, he was denying those charges; isn't that correct?

A. I don't believe he was denying or giving out any information. He did it.

Q. He - -

A. (inaudible) admit to it.

Q. He made the statement?

A. He made the statement, I'd like to see them prove it, as he was laughing at me going down the stairs.

-(RP Volume 4, 180, L.3 - 181, L.2)

This is also consistent with the earlier testimony by the defendant when he was demonstrating that this particular witness had an extreme bias and hatred towards him.

Q. (Defense Attorney): Did anything happen, though, in late 2005?

A. (The Defendant- Keith Latimer): Yes.

Q. What happened?

A. What happened? Lisa came down right after Christmas to the Portland area. She stayed the night and then shortly after that found out about a - - another lady that I was seeing.

Q. What was her name?

A. Tawana.
Q. Okay. Did your relationship change after that?
A. With Lisa?
Q. Yes.
A. Yes, sir, it did.
Q. Did it also change with Tawana?
A. Yes, sir, it did, eventually.
Q. Was there any incident after that with Lisa and Tawana together that you recall?
A. Yes, sir.
Mr. Farr: Objection. Relevance.
Mr. Bennett: If I may.
The Court: Relevance?
Mr. Bennett: To show bias on those witnesses' part, on the one witness' part.
The Court: All right. I'll allow brief testimony. I'll overrule the objection.
Mr. Bennett: Okay.
Q. Briefly, what did you recall with them together?
A. I was called by my first sergeant to come back to town. I was in Utah visiting my sister.
Q. Let me stop you here.
A. Okay.
Q. Was there any incident that occurred at your residence?
A. Yes.
Q. And briefly, what was that?
A. That was that since I wasn't there to get my things out of the house, Tawana and Lisa both together loaded her pickup on a couple of occasions and brought my stuff to my yard in the rain and dumped it in my driveway.
-(RP Volume 4, 158, L.11 - 159, L.23)

The State would submit that the defense attorney was attempting to show the bias of this particular witness towards him and thus her belief

that he had done this shows more her hatred of him than any truthfulness of the information supplied.

If there is any question that the defense attorney was attempting to establish the bias of this particular witness it is further shown during his closing statement to the jury:

Now, no admissions. Tawana, the former girlfriend, obviously has an axe to grind. She and Lisa, who also has an axe to grind, unceremoniously took Mr. Latimer's personal belongings and left them outside his house in the - - they said the driveway.

Well, if you look at this picture, some of the things are clearly in the grass. You can see them sitting in the grass. And apparently it started to rain a little bit later, so that didn't help his personal belongings. And there was also an exchange of unpleasantries between them, so Tawana is not a very unbiased witness. Now, no flight. You know, it's not required. Is it an indication of guilt? Of course. There's none of that here.

There is a denial. I didn't do it. Talk to her, let me know what's going on here. And he indicated he was told that she was mistaken, he didn't do anything wrong and they continued to do things together. Now, they continued together after the divorce and after March '05.

-(RP Volume 4, 209, L.13 210, L.7)

As the previous argument has indicated, a decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77 – 78, 917 P.2d 563 (1996); State v.

Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); State v. Hermann, 138 Wn. App. 596, 605, 158 P.3d. 96 (2007).

The State submits that the defendant was attempting to show faulty memory as it related to the photograph and the photograph really didn't have that much to do with the underlying circumstances of the case. Further he was attempting to show overall bias on the part of the complaining witness and the former girlfriend. These are trial tactics that would not constitute ineffective assistance of counsel.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 13 day of June, 2008.

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