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Court of Appeals
Division III
State of Washington

NO. 34057-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

ARNULFO CISNEROS SANCHEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his right to effective assistance of counsel.

2. The trial court exceeded its sentencing authority when it imposed as a condition of community custody banishing Appellant from Grant County for life. CP 139.

Issues Pertaining to Assignments of Error

1. Was Appellant deprived of his right to effective assistance of counsel in his trial for attempted rape and associated offenses in which Appellant's defense was consent, when his counsel repeatedly failed to object to hearsay evidence introduced through law enforcement witnesses repeating the complaining witness's claim she did not consent?

2. Did the sentencing court exceed it sentencing authority by banishing Appellant from Grant County for life as a condition of community custody when it was more restrictive than necessary to prevent contact between the Appellant and complaining witness, and where Appellant lived, worked and had a family in Grant County until his incarceration in this matter?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grant County Prosecutor charged appellant Arnulfo Sanchez with attempted second degree rape, first degree burglary with sexual motivation, indecent liberties by forcible compulsion, stalking and second degree criminal trespass. CP 13-17. The prosecutor alleged that late in the evening on June 2, 2014, Sanchez snuck into the bedroom of Maria Navarrete while she slept, engaged in sexual contact with her, ejaculated on her underwear, and then fled after she woke up and they had a brief struggle. CP 8-10. The prosecutor further alleged that on February 13 & 15, 2015, the Sanchez unlawfully went to Navarrete's residence and was peering through her bedroom window after having allegedly been permanently trespassed from that property on July 20, 2014. CP 10-11.

A jury trial was held August 5-7, 2015, before the Honorable John M. Antosz. 1RP[1] 1-310. Sanchez was convicted as charged, except for the second degree criminal trespass for which he was acquitted. CP 59-64; 1RP 302-04. The court imposed an indeterminate sentence of 82 months to life for the attempted rape, concurrent determinate sentences of 70 months and 34 months for the indecent liberties and burglary,

[1] There are four volumes of verbatim report of proceedings referenced as follows: 1RP - three-volume consecutively paginated set for the dates of August 5-7, 2015 (trial); and 1RP - December 15, 2015 (sentencing).

respectively, and a concurrent 200 days for the stalking, with 100 days suspended. CP 121, 126. The court also imposed 18 months of community custody for the indecent liberties and burglary, and life-long community custody for the attempted rape. CP 122. Conditions of community custody include having no contact with the complaining witness or her family and, "(20) Defendant shall not enter Grant County." CP 139.

Sanchez appeals. CP 145-70.

2. Substantive Evidence

At trial, the prosecution called four witnesses, as follows;

* **Maria Navarrete**: the complaining witness (1RP 57-122, 248-51);

* **Deputy Raymond Appling, Jr.**: the deputy who responded to reports of a suspicious person outside Navarrete's bedroom window on February 15, 2015 (1RP 124-27);

* **Deputy Korey Judkins**: the deputy who responded to Navarrete's claim someone attempted to rape her on June 2, 2014 (1RP 128-45); and

* **Sergeant Darrik Gregg**: the officer who responded to Navarrete's residence on July 20, 2014, and allegedly permanently trespassed Sanchez from the property on that date (1RP 146-53).

The defense called two witnesses as follows;

* **Alejandrina Sanchez**: [2] Sanchez's wife and friend of Navarrete (1RP 180-201); and

* **Arnulfo Sanchez**: the accused (1RP 202-39).

Navarrete and Alejandrina, were "very close" friends and would often spend time together at the Sanchez residence. 1RP 60. And because of his mechanical skills, Navarrete would hire Alejandrina's husband, Sanchez, to work on her vehicles. 1RP 61. Sometimes this involved Sanchez going to Navarrete's home to conduct the repairs. Id.

In late 2013, Alejandrina noticed a change in her relationship with Navarrete. 1RP 187-88. Navarrete did not call as often, they did not get together as much, and she also noticed Sanchez had become more distant and was spending more time fixing Navarrete's cars, so she became suspicious of a possible affair. 1RP 188-89. Alejandrina recalled an aborted attempt to confront Navarrete about her suspicions. 1RP 191. When she did confront Sanchez, he denied any wrongdoing. 1RP 194.

On June 2, 2016, Sanchez was at Navarrete's working on one of her cars while Navarrete was visiting Alejandrina at the Sanchez home. 1RP 64-65. When Navarrete returned home that afternoon, Sanchez was still there working. 1RP 65-66. According to Navarrete, Sanchez came to

[2] For clarity, Alejandrina Sanchez will be referred to hereafter by her first name only. No disrespect is intended.

her front door at about 5:30 or 6 p.m., and requested water, which she provided, and then he left. Id.

According to Sanchez, however, in addition to working on her cars, Navarrete had also asked him to fix an outside lamp at her home. 1RP 215. When he asked Navarrete for water while he was working on the lamp, she returned with the water more scantily clad, and was touching and acting flirtatious towards him, as she had been earlier in the day. 1RP 216, 230. When Sanchez told Navarrete he had to leave for church before he could finish fixing the lamp, Navarrete ask him to return later, but he told her did not think he could. Id. Sanchez recalled being nervous as he thought about the encounter on the way home, particularly because Navarrete was his wife's friend. 1RP 215-16.

When Sanchez arrived home, he was late, which angered his Alejandrina, so they argued, ending with Sanchez leaving again to think about Navarrete's earlier advances. 1RP 217. Sanchez recalled parking outside Navarrete's home a little after 10 p.m., in hopes of talking to her. 1RP 218. He approached her bedroom window and knocked, but she did not respond. Id. He could see her moving on the bed, however, so assuming she was awake, Sanchez entered through her open window and hugged Navarrete, who hugged him back and said, "I thought you weren't

coming back." 1RP 218-19. They then had consensual sex before he left back out the window. 1RP 220, 231-32.

At trial, Navarrete gave a different version of events. According to Navarrete, June 2nd was a hot day. 1RP 66. Because of the heat, Navarrete went to bed at about 8 p.m. with her lights off, bedroom windows open, no sheets or blankets on and dressed only in a t-shirt and underwear. 1RP 66-67. Navarrete claimed that despite being a light sleeper, she awoke at about 11:30 pm to discover a man kissing her buttocks as she lay face down on the bed. 1RP 71, 97. She claims that when she turned over the man then jumped on top of her and held her down. 1RP 71-72. When she protested, the man told her not to scream and proceeded to kiss her all over and tell how much he loved her, missed her and desired her. 1RP 73. Navarrete testified that when she finally quit struggling, the man loosened his grip on one of her arms and she managed to escape his clutches, at which point the man jumped out the window and fled in a small car. 1RP 74-76.

Navarrete claimed that the man's voice and build were similar to those of her ex-husband's, Marcio Navarrete. 1RP 58, 75, 81. Navarrete also testified, however, that when she felt the man's back it was very hairy, and that the man's voice also sounded kind of like Sanchez's. 1RP 80. Navarrete admitted she did not immediately report the alleged incident to

1RP 87. According to Gregg, he then contacted Sanchez, for whom English is a second language, and told him in English that he was permanently trespassed from Navarrete's property. 1RP 147, 149, 222. According to Sanchez, however, when officers contact him outside Navarrete's home, they asked if he was stealing anything, and then pushed him repeatedly until he was off her property, but never said he was trespassed. 1RP 222.

According to Sanchez, he stayed in contact with Navarrete by phone for a little over a month after the July 20th incident, but after that she stopped answering his calls, so he stopped calling her. 1RP 223, 226. He assumed it was because she was displeased with the repairs he had done for her. 1RP 225.

Sanchez recalled attempting to contact Navarrete in February 2015, using a flashlight to communicate with her, as she had suggested they do back in June 2014. 1RP 215, 226, 229-31. According to Navarrete, however, on both February 13 & 14, 2015, she awoke to someone outside her bedroom window at about 5:15 a.m. shining a light. 1RP 88-89. The first time Navarrete got up to look and saw someone running and then leaving in a car with a loud muffler, like the car she claimed her June 2, 2014 assailant had fled in. 1RP 89-90. Navarrete claimed she bought a flashlight and bat that day, and then when she heard

police until the following day, and only after her coworkers talked her into it and only then after she finished her work shift. 1RP 78.

Navarrete contacted Deputy Judkins and gave him a statement claiming someone had tried to rape her the previous evening, but did not say it was Sanchez, claiming instead she was unsure who it was. 1RP 79-80. Navarrete indicated she did mention Sanchez in her conversation with Judkins, but only because he had a voice similar to the alleged assailant. 1RP 80. She claimed that at the time she was reporting the incident to Judkins, she thought the alleged assailant was her ex-husband. 1RP 81. Navarrete eventually provided Judkins with the underwear she was wearing during the encounter because it had "stuff" on them, which Sanchez stipulated was his semen. 1RP 80-81, 122, 155.

Both Navarrete and Sanchez testified they would occasionally talk by phone after June 2, 2014, although Navarrete claimed it was only Sanchez calling her to check whether her vehicles were operating properly. 1RP 82, 223. On July 20, 2014, Sanchez went to Navarrete's home to retrieve a battery charger he had left. 1RP 83, 221. Navarrete claimed that when she saw Sanchez on her property, she got concerned and called 911. 1RP 83-85.

When Sergeant Gregg arrived and contacted Navarrete, she told him she called because Sanchez had broken into her home in the past.

noise outside her window again in the early morning of February 14, 2015, she quietly got up, took her flashlight to the window, drew back the curtains and shined her light out the window, only to discover Sanchez standing outside. 1RP 91-92, 106. Navarrete claimed she screamed loudly, hit the window, and then saw Sanchez get in his car and drive away. 1RP 92, 106. She then called 911. Id.

Deputy Appling, who responded to Navarrete's February 14, 2015 911 call the next day, testified that after she told him she had seen a suspicious person in her yard, he looked in the area by the bedroom window and found faint footprints in the soil and landscaping bricks that appear out of place, as if they had been stepped on. 1RP 124-25. The prosecution completed its direct examination of Deputy Appling with the following exchange:

> Q. Was Miss Navarrete able to tell you who had been outside her bedroom window?
> A. She said that --
> THE COURT: That question is was she able to, so that would be yes or no.
> A. Yes.
> . . .
> Q. Was she positive as to who she was able to tell you it was?
> A. Yes.
> Q. Did she give you a name?
> A. Yes.
> Q. What was that name?
> A. Arnulfo Cisneros Sanchez.

1RP 126. There was no defense hearsay objection.

Similarly, defense counsel did not object when the prosecution elicited hearsay testimony from the other two law enforcement witnesses, Deputy Judkins and Sergeant Gregg. For example, during Judkins' direct examination the prosecution elicited without defense objection that Navarrete described her alleged attempted rapist as "six feet tall," "slender," and "built like" Sanchez, but that his voice reminded her of only her ex-husband. 1RP 130-32, 135-36. Similarly, the prosecution was able to elicit from Sergeant Gregg without defense objection that Navarrete told him when he responded to her 911 call on July 20, 2014, that Sanchez tried to rape her previously. 1RP 146, 148.

C. ARGUMENTS

1. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED SANCHEZ OF A FAIR TRIAL

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution is violated when the attorney's deficient performance prejudices the defendant such that confidence in the outcome is undermined. Strickland v.

Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 229, 743 P.2d 816 (1987).

Counsel's performance is deficient when it falls below an objective standard of reasonableness and is not undertaken for legitimate reasons of trial strategy or tactics. State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88; Saunders, 91 Wn. App. at 578. It is well settled that failure to object to inadmissible testimony constitutes deficient performance. See e.g., State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987) aff'd, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (lack of timely objection to admission of child hearsay statements constitutes deficient performance); State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1995), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

Because Sanchez bases his ineffective assistance claim on counsel's failure to challenge the admission of evidence, he must also show that an objection to the evidence likely would have been sustained. Saunders, 91 Wn. App. at 578 (citing McFarland, 127 Wn.2d at 337, n.4).

Witnesses generally must testify only from their personal knowledge of events or circumstances. ER 602. Testimony based on out-of-court statements offered to prove the truth of the matter asserted is inadmissible hearsay. ER 801, 802.

Here, all three law enforcement officers - Appling, Judkins, & Gregg - testified about Navarrete's unsworn, out-of-court statements. The hearsay testimony of Judkins and Gregg were offered to prove her assertion that Sanchez tried to rape in June 2014, and the hearsay testimony of Appling was offered to prove it was Sanchez outside Navarrete's bedroom window in February 2015. This was hearsay, for which no exception applies. See ER 803 & 804 (setting out exceptions to the hearsay rule under ER 802).

There was no possible reasonable strategic basis for Sanchez's counsel not to object to the hearsay testimony of the officers. To the contrary, the defense was consent, so any evidence tending to confirm Navarrete's claim of non-consent was harmful to Sanchez. The hearsay testimony of the three officers did just that because by reiterating Navarrete's claims of alleged wrongdoing by Sanchez, it lent an aura of credibility to those claims that was otherwise absent. See State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278, 1285 (2001) ("testimony from a law enforcement officer may be especially prejudicial because the officer's testimony often carries a special aura of reliability."). The offending testimony of the three

officers was inadmissible hearsay that would have been excluded with a timely objection by counsel. Therefore, Sanchez's trial counsel's performance was deficient.

Counsel's deficient performance prejudiced Sanchez. As the parties acknowledge in closing remarks, the outcome would turn on the jury's credibility determination as to Navarrete and Sanchez. See 1RP 281 (prosecutor argues in closing that the burglary, attempted rape, and indecent liberties charges turn Navarrete's credibility); 1RP 291-92 (defense counsel argues in closing Navarrete's story lack credibility). Therefore, any evidence tending to corroborate Navarrete's version of events increased the likelihood of conviction and decreased the likelihood of an acquittal or hung jury. See State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) (corroboration increases credibility) (overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)).

The repeated failure to object and to move to strike the offending hearsay testimony undermines confidence in the outcome and requires reversal under the Strickland standard. 466 U.S. at 685-87. There is a reasonably probability that had defense counsel properly objected and moved to strike the testimony, the trial court would have sustained the objection and granted the request to strike, and as such, the outcome would likely have been different. A jury that was properly precluded from

considering the hearsay testimony may have found the prosecution failed to meet its burden to prove Sanchez guilty beyond a reasonable doubt because there was insufficient corroborated evidence to find Navarrete credible.

In addition, the offending testimony struck a direct blow to the defense theory, which was that Navarrete consented to the sexual encounter, but later regretted it and so claimed it was nonconsensual. The officers' hearsay testimony corroborating Navarrete's claim she did not consent cut directly against the defense theory and supported the prosecution theory. This unfairly prejudiced Sanchez and therefore his judgment and sentence should be reversed and the matter remanded for a new, fair trial.

2. THE LIFE-LONG BANISHMENT FROM GRANT COUNTY IS UNCONSTITUTIONAL.

The life-long banishment from Grant County imposed against Sanchez is unconstitutional. See CP 121-22.[3] It should be stricken from his judgment and sentence.

"An order banishing an individual from a large geographical area is bound to raise both societal and legal concerns." State v. Schimelpfenig, 128 Wn. App. 224, 226, 115 P.3d 338 (2005). At minimum, effectively dumping convicts on neighboring counties is bound

[3] Because Sanchez's term of community custody for the attempted rape conviction is for the maximum sentence term for that offense, which is life, the "Defendant shall not enter Grant County" community custody condition is effective for Sanchez's life unless stricken. CP 139 (appendix H to judgment and sentence)

to raise public policy concerns. Schimelpfenig, 128 Wn. App. at 226. But more importantly, banishment orders encroach on an individual's constitutional right to travel, which includes the right to travel within a state. Id. (citing Shapiro v. Thompson, 394 U.S. 618, 630-31, 634, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), overruled in part on other grounds by Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)).

Because of its constitutional implications, banishment orders are subject to strict scrutiny. Schimelpfenig, 128 Wn. App. at 226 (citing Thompson, 394 U.S. at 634). "To survive such review, the order must be narrowly tailored to serve a compelling governmental interest." Schimelpfenig, 128 Wn. App. at 226 (citing Thompson, 394 U.S. at 634).

"To determine whether a specific geographic restriction permissibly infringes on a defendant's right to travel, a sentencing court should consider the following nonexclusive factors: (1) whether the restriction is related to protecting the safety of the victim or witness of the underlying offense; (2) whether the restriction is punitive and unrelated to rehabilitation; (3) whether the restriction is unduly severe and restrictive because the defendant resides or is employed in the area from which he is banished; (4) whether the defendant may petition the court to temporarily lift the restriction if necessary; and (5) whether less restrictive means are

available to satisfy the State's compelling interest." Schimelpfenig, 128 Wn. App. at 228-29.

In Sims, this Court held a prohibition on entering Cowlitz County in order to protect the mental well-being of the victim and her family was unconstitutional because a more narrowly-tailored geographical restriction might have adequately protected the victim. State v. Sims, 152 Wn. App. 526, 532-33, 216 P.3d 470 (2009), reversed on other grounds, 171 Wn.2d 436, 256 P.3d 285 (2011). A modified no contact order pertaining to the victim and her family would be a less restrictive means of protecting them. Id.

In Schimelpfenig, this Court held a lifetime banishment order prohibiting the defendant from residing in Grays Harbor County, to protect the mental well-being of a murdered victim's family, unconstitutionally impinged upon the defendant's right to travel. Schimelpfenig, 128 Wn. App. at 225. A no contact order with the victim was a less restrictive means of protecting the victim. Id. at 230.

In Alphonse, this Court vacated a banishment order prohibiting the defendant from entering the city of Everett after he made repeated harassing phone calls to Everett police officers. State v. Alphonse, 147 Wn. App. 891, 910-11, 197 P.3d 1211 (2008) review denied, 166 Wn.2d 1011, 210 P.3d 1018 (2009). Although the order served a compelling

government interest, less restrictive means were available to serve that interest, the restriction was unrelated to rehabilitation, and the order did not allow Alphonse to petition the court to temporarily lift the restriction. Alphonse, 147 Wn. App. at 910. Again, a properly tailored no contact order would serve the same goal of protecting the police. Id. at 910-11.

Sanchez had lived with his wife (Alejandrina) and their four children in a home in Mattawa, Washington, in the southwest corner of Grant County, for the 17 years preceding his incarceration, and has lived and worked in that general vicinity for the past 30 years. CP 5, 71; 1RP 182, 202-04. The geographical restriction precluding him now from entering Grant County is unconstitutional. The restriction is unduly severe because it will prevent him, upon his release from prison, from returning to the only place he has lived and worked in the last several decades. It provides no option to petition the court to temporarily lift the restriction, and there are less restrictive means available to serve the State's compelling interest, such as an order prohibiting contact with the victim of his offense, which his judgment and sentence already provides for. See CP 139 (Appendix H, Condition (10) prohibits Sanchez from having any contact with Navarrete or her family for life).

The State has a compelling interest in preventing an individual from posing a continuing threat to a crime victim. Schimelpfenig, 128

Wn. App. at 229. This protective interest may make banishment appropriate, but only if it can be shown the defendant represents a continuing threat to the victim or witnesses upon release. Id.

Here, however, there is no evidence Sanchez represents a continuing threat to Navarrete or any other witness, either now or in 82 months when his first opportunity for release arises. The life-time no-contact order is sufficient to serve the State's interest in protecting Navarrete and her family from any future harm by Sanchez. Therefore, that part of Sanchez's judgment and sentence banishing him from Grant County for life is unconstitutional and should be stricken.

D. CONCLUSION

For the reasons stated, this Court should reverse and remand for a new trial. In the alternative, this Court should order the condition banishing Sanchez from Grant County for life stricken.

Dated this 7th day of July, 2016

Respectfully submitted

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State V. Arnulfo Sanchez

No. 34057-1-III

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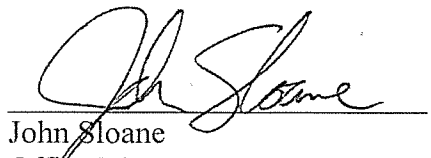
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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