

No. 80169-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RANDY J. SUTHERBY
Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

THE HONORABLE DAVID E. FOSCUE, JUDGE

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STATEMENT OF THE CASE

The State adopts by reference the Counterstatement of the Case as set forth in the Brief of Respondent. In light of assertions made by the defendant concerning the state of the record, it is necessary, however, to specifically reiterate the procedural and factual background.

Procedural Background

The defendant was charged by Information with Child Molestation in the First Degree, RCW 9A.44.083, and one Count of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, RCW 9.68A.070 on March 18, 2005 (CP 1-3). On July 18, 2005, the Information was amended to charge the defendant with one count of Rape of a Child in the First Degree, RCW 9A.44.073, one count of Child Molestation in the First Degree, RCW 9A.44.083 and ten counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, with an allegation of sexual motivation as to each of the last ten counts. RCW 9.68A.070, RCW 9.94A.835 (CP 27-32). Counts 3 through 11 of the Information were based on numerous depictions that were seized from a computer owned by the defendant. Count 12 was based upon images found in a second computer owned by the defendant (RP 11/02/05, p. 24-26). The computers were seized at the time of the defendant's arrest in this matter.

Following jury trial, the defendant was convicted as charged. Prior to sentencing, the defendant moved to dismiss nine of the ten counts of

Possession of Depictions of Minor Engaged in Sexually Explicit Conduct, alleging that all of the depictions constituted only one unit of prosecution (CP 93-110). For ease of reference, the State has attached an appendix which outlines each count.

At sentencing, the State conceded that Counts 6 and 7 were the same criminal conduct, as were Counts 9 and 10 because they appeared to be depictions of the same victim downloaded on the same date (Statement of Prosecuting Attorney, CP 156-67). The trial court found that the unit of prosecution for violation of RCW 9.68A.070 was each individual child photographed or filmed (CP 130). Accordingly, the court consolidated Counts 5, 6 and 7 into a single count and Counts 9 and 10 into a single count because the court felt that it could not determine that these were depictions of different children. The defendant was sentenced for seven separate violations of RCW 9.68A.070 (CP 130).

The defendant filed a Notice of Appeal and a Personal Restraint Petition. In the Personal Restraint Petition the defendant alleged ineffective assistance of counsel for failure of the trial counsel to object to the testimony of the mother which purportedly “vouched” for the credibility of the child and for failure to move for severance. In support of the petition he offered the declaration of attorney Todd Maybrown as an “expert” witness.

Factual Background

The victim, Libby, and her sister, Hannah, traveled with their mother from their home in Kennewick to spend the Christmas holidays with their mother's parents (RP 23-24). During this time, they spent three days and two nights with the defendant and his wife, their paternal grandparents (RP 33-34). The allegations contained in Counts 1 and 2 of the Information occurred at the defendant's residence during this time (RP 24-26). The children returned to the home of their maternal grandparents on December 22, 2004 (RP 34). On the morning of December 25, 2004, the child complained that her "pee pee" stung as she was being given a bath by her maternal grandmother (RP 35).

The defendant and his wife drove the children and their mother back to Kennewick on December 25, 2004 (RP 13-14). As they went to leave, the child was almost in tears for fear that she would have to go to the defendant's home again (RP 50). The defendant and his wife stayed at the child's residence in Kennewick until December 27, 2004. Within minutes after the defendant left, the child reported to her mother that the defendant had hurt her "pee pee" (RP 24-25). The child told her mother that the defendant had come into the room where she and her sister were sleeping, got under the covers and "poked at her pee pee" (RP 25). The child demonstrated the poke, using her index finger (RP 26).

The child was seen by a pediatrician that same day (RP 26). The physician found that the child had a mild erythema inside her labia majora

and around the hymenal opening (RP 98, 102). The child was still in pain (RP 100). The physician testified that in her view, what she observed constituted a trauma to the child which was consistent with the history provided by the child and could have been caused by a person rubbing that area with their finger (RP 103, RP 104 lines 6-24).

The child testified at trial. She told the jury that the defendant touched her “pee pee” with his finger and that he had poked her more than once. The child demonstrated how she had been poked (RP 71).

The defendant denied poking the child with his index finger or any other finger. He denied inserting his finger into the child’s vagina (RP 334). He went to great length, however, to explain how he may have accidentally touched the child. The defendant has an injured right pinky finger that he broke in an accident some 30 years prior. The finger is deformed and bends down at an angle from his hand (RP 320). Pictures of the injured finger were admitted at trial (Exhibits 24, 25).

The defendant explained that the child and her sister were asleep on a mattress in a room upstairs. Her sister, Hannah, had fallen off the mattress. Libby was naked, partially off the mattress (RP 327-28). The defendant explained how the child had thrashed around when he tried to pick her up and put her back on the mattress. He even used a doll to demonstrate what happened (Identification 26, RP 330-332). The defendant explained that his injured finger had been in the proximity of the child’s vaginal area (RP 333):

Q Okay. Go ahead and take the stand. Mr. Sutherby, at that time when you were scooting Hannah back –excuse me scooting Libby back onto the mattress, was your damaged finger, had it been in the proximity of her vagina or her privates?

A Very easily. Very easily.

In final argument, counsel for the defendant referred to this testimony, offering an explanation to the jury as to how the injury could easily have occurred (RP 421):

I think that Mr. Sutherby is sure exactly what happened. He explained to you how she stiffened up. Certainly consistent with an accidental touching by his injured finger. You saw how that was positioned there. I don't think that's just a coincidence that that's how his finger is. It took him awhile to realize that's what happened in the context of all of this.

As to the charges of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct, the defendant explained that he would download numerous images. The images would come up on the screen in a “stack” so that he could only see the top image and the margin of the image below (RP 302-03). The defendant explained that sometimes these images would contain child pornography that he had never intended to select. The defendant claimed that when he saw them on his computer screen, he immediately deleted them (RP 301-04, 354-55). He did admit, however, that he viewed child pornography on his computer and that he felt that this was “pretty normal” (RP 198).

ISSUES PRESENTED

The defendant received effective assistance of counsel.

The State incorporates by reference herein that portion of the Brief of Respondent addressing this issue (Brief of Respondent p. 12-24).

This court is well familiar with the standard to be applied when a claim of ineffective assistance of counsel is made. Counsel is presumed competent. To prevail, the defendant must show there are errors that are so serious that counsel was not functioning as “counsel” as guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 687, L.Ed.2d 674, 104 Sup.Ct. 2052. There must be a showing that the representation fell below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is not for new counsel to come in and now assert that matters should have been handled differently. In particular, if counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

The competence of counsel is a legal question for the court to decide. It is not generally the subject matter of expert opinion. Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995). In a similar context, this court has held that whether an attorney’s conduct violated the rules of professional conduct is a question of law. The trial court may properly

disregard any expert testimony containing conclusions of law. In Re Disciplinary Proceeding of Burtch, 162 Wn.2d 873, 891 (2008) citing Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992).

A claim of ineffective assistance of counsel cannot be determined on a set of generalized rules that may be set out by someone proclaiming to be an “expert” on Strickland. Hovey v. Ayers, 458 F.3d 892, 911 (9th Cir. 2006).

Nonetheless, this standard does not “require[] that expert testimony of outside attorneys be used to determine the appropriate standard of care.” LaGrand, 133 F.3d at 1271 n. 8; *see also* Fed.R.Evid. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert ...*may* testify thereto in the form of an opinion or otherwise” (Emphasis added)). The Supreme Court has cautioned against evaluating ineffective assistance claims based on generalized rules, noting that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Strickland, 466 U.S. at 688-89, 104 S.Ct. 2052.

The declaration of “expert” Todd Maybrown should be stricken. He was provided with selected portions of the record from which to express his “expert” opinion. It does not appear that he has ever spoken with the defendant or trial counsel. He has almost no familiarity with this matter, yet he would have this court give credence to his “expert” opinion.

No record of any kind has been developed in this case concerning the issues presented herein. Aside from the declaration of the “expert”, there is the declaration of counsel James Lobsenz which recounts what he

recalls to be a “very brief” telephone conversation between himself and trial counsel, David Hatch. From this, the defendant wishes to accuse Hatch of being ineffective in representing him at trial.

This court has no idea of the conversations that may have taken place between the defendant and trial counsel. The defendant may have decided that he wanted these matters tried together. Counsel in this case was retained. Expense could have been a factor in determining whether these matters should be severed. Undoubtedly, trial counsel and the defendant discussed strategy including the defense that would be presented to the particular charges.

This court must take great care in examining a claim of ineffective assistance of counsel. See True v. State, 457 A.2d 793, 796 (1983):

The examination of any aspect of defense counsel’s conduct requires particular care lest there be a necessary and unwise interference in the attorney-client relationship. In order to be effective, the application of this standard must be based on the perception that:

The court’s appraisal requires a judgmental rather than a categorical approach. It must be wary lest its inquiry and standards undercut the sensitive relationship between attorney and client and tear the fabric of the adversary system. A defense counsel’s representation of a client encompasses an almost infinite variety of situations that call for the exercise of professional judgment... This limitation preserves the freedom of counsel to make quick judgments, and avoids the possibility that there will be frequent and wide-ranging inquiries into the information and reasoning that prompted counsel to pursue a given course. The problem is complicated by the fact that these decisions often derive from information supplied by the client. U.S. v. DeCoster, 624 F2d 196, 208 (DC Cir. 1976).

The deference required of the reviewing court is substantially heightened when the subject of the inquiry is a strategic or tactical decision made by defense counsel. The task of formulating strategy involves the highest levels of professional judgment and the sum total of defense counsel's knowledge, training, experience, and wisdom. It is an area of judgment which readily lends itself to criticism based on hindsight... A successful strategy is one that works. If fortune dictates an unfavorable result, the fact that the strategy employed was unconventional is not necessarily established that it was ill-conceived. A deferential standard is appropriate in reviewing such tactical decisions and the question presented is whether the strategy has been shown to be manifestly unreasonable.

These sentiments have most recently been voiced by at least one member of this Court. State v. Hicks, Wn.Sup.Ct., decided 04/24/08 (J. Chambers, concurring):

...it is not always in the client's best interest to energetically argue every technicality of the law. The real skill in advocacy is not in high flying oratory or in the raising every possible objection, but in making the hard decisions as to if, when, and how to argue the facts and the law.

It is incumbent upon a defendant who claims ineffective assistance of counsel for failure to litigate a motion, such as a motion for severance, to demonstrate that there was not a tactical basis for declining to bring the motion, that the motion, if made, would have been granted by the trial court, and, if granted, the result of the trial would have been different. Kimmelman v. Morrison, 477 U.S. 365, 375, 106 Sup.Ct. 2574, 91 L.Ed.2d 305 (1986).

As previously pointed out in the Brief of Respondent, these counts were properly joined for trial under CrR 4.3(a) because they are of "a same

or similar character, even if not part of a single scheme or plan” CrR 4.3(a)(1) (Brief of Respondent p. 13). CrR 4.3 has been construed expansively by the courts to promote the public policy of conserving judicial and prosecution resources. State v. Bryant, 89 Wn.App. 857, 864, 950 P.2d 1004 (1998).

In the first instance, it is unlikely that a motion for severance would have been granted by the trial court. Given his defense, it would not have been an abuse of discretion for the trial court to deny a motion to sever. Counsel for the defendant had to know that evidence of his possession of the depictions would be available for rebuttal, even if those counts had been severed. See State v. Bouchard, 31 Wn.App. 381, 639 P.2d 761 (1982); State v. Womac, 130 Wn.App. 450, 456-57, 123 P.3d 528 (2005).

Secondly, the decision not to make a motion for severance was clearly a tactical decision. Counsel for the defendant had to take into account the evidence against him, including the clear and timely disclosure by the child and the fact that upon examination done shortly after the incident, the physician found an injury to the child that was completely consistent with the description of the offense as given by the child. The child stated that she was poked multiple times in her private area by the defendant. The injury found by the doctor was completely consistent with such “poking” by a human finger.

Counsel for the defendant had to take into account the defense that his client would present at trial. The defendant claimed that the incident

as described by the child and the injury suffered by the child had to have been the result of an unfortunate accident. The defendant went to great lengths to explain that he had an injury to his pinky finger that made it stick out in an abnormal way (RP 320). The defendant explained how he tried to pick up the child and put her back on the mattress (RP 330-332). He even went so far as to use a doll to demonstrate where his hands were located (RP 331-32). He explained that his damaged finger had been in the proximity of the child's vaginal area (RP 333).

Trial counsel had a strategic decision to make. His defense to the charge of Child Molestation and Child Rape was that the touching, if any, was accidental and was not for sexual motivation. His defense to the charge of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct was nearly identical. The defendant explained that he never intended to download these depictions. The images he selected came up on the screen in "stacks", sometimes with images of child pornography that he had not intended to select. When they showed up on his computer, he immediately deleted them (RP 301-04, 354-55).

The choice for trial counsel was whether to leave the matters joined for trial and put on a uniform, organized defense or to attempt to sever the offenses knowing, that in all likelihood, this conduct would be introduced in the Child Rape/Child Molestation trial when he asserted his claim of accident. Should counsel for the defendant take the gamble that he might be able to keep such evidence out or should he address all of the

evidence from the outset in a uniform, organized defense? Should counsel consider the impact of such evidence on the jury if they hear it for the first time during cross-examination of the defendant or in rebuttal? If this occurred, could the defendant adequately explain on re-direct that the downloads, like the touching, were accidental?

Finally, even if the motion for severance had been granted, the result of the trial would not have been different. There was strong evidence of his guilt on both sets of charges. This included the clear and lucid disclosures of the child, the timeliness of the disclosures, the injury to the child and the admissions of the defendant. The defendant told Detective Darst that he had sexual fantasies about children, but claimed that he would never “cross the line” (RP 196). The defendant admitted that he felt it was “pretty normal” to view child pornography on his computer (RP 198).

The defendant admitted to the ownership of both computers. He told investigators that they would find “child pornography” on his computers (RP 298-99). The sheer volume of downloads is a strong indication of his guilt of the charge. His only explanation was that each of these multiple downloads was “accidental” and not intended.

The severance would not have resulted in the exclusion of evidence at his separate trials. Given his defense to the child rape charge, the fact of his possession of the images would be admissible to prove lack of accident or mistake. In a separate trial for possession of the depictions, his conduct

toward the child would have been admissible to rebut his claim that the touching was accidental and not done for sexual gratification. Such cross-admissibility of evidence supports joinder of the charges. State v. Bythrow, 114 Wn.2d 713, 790 P.2d 154 (1990).

The claim raised herein by this defendant, through new counsel, is simply an attempt to challenge legitimate trial strategy. It is particularly distressing when two attorneys, one of whom has never spoken with the defendant and has done nothing but read a small portion of the record in this matter, try to dictate to this court what strategy defendant's counsel at trial should have exercised.

Blakely v. Washington does not preclude the judge from determining whether the same minors are depicted in individual counts.

The State believes that the proper unit of prosecution is each photograph, film or digital file containing a photograph or film. State v. Gailus, 136 Wn.App. 191, 147 P.3d 1300 (2006). The trial court held, without the benefit of the decision in Gailus, that the unit of prosecution for a violation of RCW 9.68A.070 is each individual child photographed or filmed. If this court is to adopt the reasoning of the trial court, then the proper way to treat this at sentencing is to adopt a "default" rule that each photograph is a separate unit of prosecution unless the trial court can determine that some of the photographs depict the same child.

The basic rule is that no fact, other than the fact of a prior conviction, may increase the penalty for the crime beyond the prescribed statutory maximum. Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L.E.2d 435, 120 Sup.Ct. 2348 (2000). The statutory maximum is the top end of the standard range as computed by the trial court. Blakely v. Washington, 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.E.2d 403, 413 (2004). The Apprendi/Blakely analysis has no application to the determination of a minimum sentence. McMillan v. Pennsylvania, 477 U.S. 79, 91 L.E.2d 67, 106 Sup.Ct. 2411 (1986).

This court applied similar reasoning when it held that the trial court could properly determine what crimes constituted “same criminal conduct” within the meaning of RCW 9.94A.525(5)(a). In Re Markel, 154 Wn.2d 262, 274-75, 111 P.3d 249 (2005).

Under this sentencing scheme, a “same criminal conduct” finding is an exception to the default rule that all convictions must count separately. Such a finding can operate *only* to decrease the otherwise applicable sentencing range. The jury determined that the Markels were guilty of four separate counts, and no aggravating factors were considered by the judge. Accordingly, *Apprendi* and *Blakely* are not implicated under the facts of the Markels’ cases because the “same criminal conduct” finding could only have lowered their applicable sentencing range and, therefore, the Markels are not entitled to resentencing.

Assuming that the correct unit of prosecution is each individual child, the prosecution will make a review of the investigation and a preliminary determination as to how many separate victims there appear to

be. This will dictate the maximum number of counts that may be filed. If, following jury trial, the defendant is convicted, then the trial court would have the option of consolidating counts on the basis of its determination that certain individual counts depict the same child. The trial court would not have the option to separate out multiple depictions from a single count and thus increase the standard range. The prosecution, by its charging decision, sets the maximum number of counts for which the defendant may be convicted and the maximum standard range.

Accordingly, Blakely and Apprendi play no part in this matter.

DATED this 30 day of April, 2008.

Respectfully Submitted,

By: Gerald R. Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa

APPENDIX

Count	Exhibit No.	Date Downloaded	Reference to the record	Image seized from
3	6	02-04-04	RP 11/2/05, p. 7-8, 18, 19	Computer B, Ex. 4
4	7	02-02-04	RP 11/02/05, p. 16-19	Computer B, Ex. 4
5	8	02-02-04	RP 11/02/05, p. 19	Computer B, Ex. 4
6 & 7	9, 10	02-02-04	RP 11/02/05, p. 19-20	Computer B, Ex. 4
8	11	01-27-05	RP 11/02/05, p. 20-21	Computer B, Ex. 4
9	12	02-18-05	RP 11/02/05, p. 21-22	Computer B, Ex. 4
10	12	02-18-05	RP 11/02/05, p. 22	Computer B, Ex. 4
11	14	found to be possessed on date of arrest and seizure of computer, 03-02-05, download date not available	RP 11/02/05 p. 23-24	Computer B, Ex. 4
12	15	11-29-02	RP 11/02/05 p. 24-26	Computer A, Ex. 3