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NO. 94418-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OSCAR RAUL LOPEZ,

Petitioner.

ANSWER TO WACDL AMICUS BRIEF

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A. ISSUES PRESENTED BY AMICUS WACDL

The Washington Association of Criminal Defense Lawyers (WACDL) presents two arguments in its amicus brief. Those arguments are defined on page two of their brief, as follows:

> 1. "[W]when a trial court grants a new trial based upon its determination that defense counsel's mental illness affected the fairness of a criminal trial, that order is entitled to a much stronger showing of an abuse of discretion before it is reversed.
>
> 2. "[W]hen a trial court determines defense counsel's mental illness rendered his trial performance deficient under Strickland v. Washington, such a conclusion should be deemed structural error and the prejudice prong normally required by Strickland need not be shown."

B. ARGUMENTS IN ANSWER TO WACDL

The State of Washington respectfully asks this Court to reject both of WACDL's arguments. First, the standard of review for a ruling applies to all such rulings in that category; the standard does not depend on the *result* of the ruling. The super-deference proposed by WACDL for grants of a new trial is no standard at all. It would make grants of a new trial virtually unreviewable. Second, any defendant claiming ineffective assistance of counsel under the Sixth Amendment must prove prejudice from counsel's deficiencies. The doctrine of "structural error" is inapposite where an error does

not always result in an unfair trial, and because there is no Sixth Amendment "error" until the defendant has proved that he was prejudiced by counsel's deficient performance.

1. A RULING ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PRESENTS A MIXED QUESTION OF LAW AND FACT AND IS REVIEWED DE NOVO BY THE APPELLATE COURT, REGARDLESS OF WHICH PARTY WON OR LOST.

WACDL argues that the trial court's ruling is entitled to greater deference than the usual abuse of discretion standard because the trial court granted rather than denied a motion for new trial. Amicus Brief, at 6-7. The argument relies on the Court of Appeals decision applying an abuse of discretion standard. See State v. Lopez, No. 74333-3-I, slip op. at 4 (Wash. Ct. App., filed Mar. 20, 2017) (citing State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989)).

WACDL's argument proceeds from a faulty premise that abuse of discretion is the standard of review. It is not. Jackman did not involve an ineffective assistance of counsel claim. When a defendant alleges ineffective assistance of counsel, he is entitled to a new trial only if he can show that counsel's performance was deficient and only when he can prove he was prejudiced by that

deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The inquiry is objective and applies to both trial courts or appellate courts. The question is a mixture of law and fact that is reviewed de novo by an appellate court. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (citing Strickland, 466 U.S. at 698). Hence, review of a denial or grant of a motion for new trial based on ineffective assistance of counsel must ask whether the trial court properly applied the Strickland standard. There is simply no authority for the proposition that an appellate court must review this objective inquiry differently based on whether the motion was denied or granted.

Even if the abuse of discretion standard is applied, however, it would be met under these circumstances. A trial court abuses its discretion when its discretion is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court's ruling that evidence of Lopez's supposed reputation for not molesting children is an untenable grounds for finding deficient performance. Similarly, the court conclusion that such evidence can be "particularly impactful" was untenable. 11RP 1311. The abuse of discretion standard of review would not meaningfully change the way this Court considers

this case. Both decisions are objective determinations that can be made by either a trial court or an appellate court, so they are reviewed de novo.

Relying on a number of cases that say that a grant of a new trial is subject to greater deference than a denial of such a motion, WACDL argues that an undefined measure of super-deference is required when a trial court finds ineffective assistance of counsel. Below-signed counsel has not found any case applying such a "standard" to a claim of ineffective counsel. Moreover, as one appellate court has observed:

> ...[D]ecisions granting or denying a motion for a new trial usually rest on questions of law and the application of a rule of law, rather than the trial judge's assessment of the evidence or the impact of that evidence on the jury. The latter functions are constitutionally reserved for the jury. The trial judge is not a "13th juror." State v. Williams, 96 Wn.2d 215, 221–22, 634 P.2d 868 (1981). Second, a cursory review of appellate decisions between 1974 and 1996 shows that 14 trial court orders granting a new trial were appealed. Six, or 42.9 percent, were reversed. During the same period, 49 denials of a new trial were reviewed, with only 14, or 28.6 percent being reversed.
>
> It may be time to stop reciting the accepted standard of review for orders granting or denying motions for a new trial and look instead at the underlying reasons given for this discretionary decision. A fine balance must be struck between jury, trial court, and appellate court to prevent one from usurping the legitimate function of the others. Williams, 96 Wn.2d at 222, 634 P.2d 868. The announced standard of review for motions for a new trial does not further this end.

State v. Marks, 90 Wn. App. 980, 984-85, 955 P.2d 406 (1998).

A trial court's grant of a new trial based on mixed questions of law and fact, like an ineffective assistance of counsel claim, is reviewed de novo. Although the trial court's factual findings are entitled to great deference, there is no generalized super-deference simply because the ruling granted the motion.

WACDL's proposed standard of review would encourage a trial court to overturn a verdict simply because it knew the appellate court would apply a "you had to be there" standard of review. Amicus Brief, at 8. This is not a standard; it amounts to nothing more than encouraging court's to rely on a "gut check" rather than reasoning. If a mentally ill lawyer failed at trial, there will be evidence of that failure, and it is the trial court's duty to base its ruling on such evidence. Failing to require objective articulated reasons for the trial court's ruling would permit stereotypes and unconscious biases about mental illness to carry more weight than a careful evaluation of the lawyer's performance. WACDL's argument for a relaxed standard of review should be rejected.

2. A LAWYER DIAGNOSED WITH MENTAL ILLNESS SHOULD BE ADJUDGED UNFIT ONLY IF HIS CONDUCT CAUSED PREJUDICE; THE SIMPLE FACT OF A MENTAL HEALTH DIAGNOSIS DOES NOT MAKE A LAWYER CONSTITUTIONALLY INEFFECTIVE.

WACDL argues that a defendant claiming ineffective assistance of counsel should be entitled to relief if he proves both that counsel's performance was somehow deficient and that the lawyer suffered from a diagnosed mental illness. It argues that such a defendant is entitled to a presumption of prejudice. This argument should be rejected. The Supreme Court and other appellate courts have consistently rejected per se rules for ineffective assistance of counsel and this proposal should be rejected, too. The proposal trades on stereotypes and unconscious biases against mental illness rather than on the lawyer's actual *conduct* and the effect of that conduct on the trial.

WACDL acknowledges that it would be inappropriate to bar lawyers with a mental health diagnosis from practicing law, referring to the many wonderful and capable lawyers who have a mental health diagnosis but still practice competently, and to the paucity of authority for barring lawyers with mental illness. Amicus Brief, at 5-6. WACDL is correct, but its rationale is too narrow. Lawyers

should be evaluated based on their conduct rather than on stereotypes about mental illness.

Over the past several years, the Civil Rights Division of the Department of Justice worked closely with bar associations to curtail invasive inquiries into the mental condition of bar applicants during "character and fitness" screenings, because "[a]sking would-be lawyers standard questions about their mental health, including their history of diagnosis and treatment, could violate the Americans with Disabilities Act."[1] The Civil Rights division concluded that an individual's prior behavior was the best predictor of future success in law practice, that inquiries into health diagnoses were discriminatory, so character and fitness evaluations should focus on conduct rather than on diagnoses.[2] Affected bar applicants agree, arguing that "[l]egally, ethically and practically speaking, those of us living with mental illness should be judged by our deeds, not our diagnoses." Melody Mozzi, Lawyers of Sound

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[1] "DOJ says bar officials violate ADA by asking applicants too much about their mental health," in ABA Journal, February 2014, http://www.abajournal.com/news/article/doj_says_bar_officials_violated_ada_by_asking_applicants_too_much_about_the/ (last accessed 10/25/17). See also "State bars may probe applicants' behavior, but not mental health status, says DOJ," ABA Journal, June 2014, http://www.abajournal.com/magazine/article/state_bars_may_probe_applicants_behavior_but_not_mental_health_status (last accessed 10/25/17).

[2] The full letter from the DOJ to the Louisiana Supreme Court can be found at https://www.ada.gov/louisiana-bar-lof.pdf.

Mind?, N.Y. Times, August 5, 2013.[3] This Court has now amended its character and fitness evaluations to comply with the Americans With Disabilities Act.[4] The focus is now on an applicant's conduct rather than on some general health diagnosis.[5]

WACDL's proposal would undercut this advancement in our understanding of the proper way to evaluate attorney fitness. WACDL argues that "[w]hen an attorney suffers from a mental illness that renders him or her incompetent at trial, this Court should find that the error is structural" and thus, always subject to a new trial. Amicus Brief, at 11. This argument fundamentally misperceives the Supreme Court's jurisprudence on ineffective assistance of counsel and on structural error. It should be rejected.

The Supreme Court recently explored the relationship between ineffective assistance of counsel and structural error in Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017). Weaver's trial lawyer failed to object to an order

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[3] Available at http://www.nytimes.com/2013/08/06/opinion/lawyers-of-sound-mind.html?search-input-2=lawyers+mental+health (last accessed 10/25/17).

[4] http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=487. These proposals were adopted and were effective September, 2016.

[5] APR 22.1(e) ("Any inquiry by the Bar Association or the Character and Fitness Board about drug or alcohol dependence, a health diagnosis, or treatment for either can occur only if it appears that the Applicant has engaged in conduct that demonstrates the inability to meet one or more of the essential eligibility requirements.").

closing the court during voir dire. Weaver claimed that counsel's performance was deficient in failing to object, and that he was entitled to a new trial without a showing of prejudice, because an improper courtroom closure is structural error. Weaver, 137 S. Ct. at 1906-07.

The Supreme Court rejected Weaver's argument. The Court identified three reasons that an error might be deemed structural: 1) to protect some interest other than the defendant's right to a fair trial; 2) because the effects of the error are inherently difficult to quantify; or 3) because the error always results in a fundamentally unfair trial. Id. at 1908. More than one rationale might apply to any given error. Id. The Court held that the right to public trial was structural because the effects of its violation were difficult to quantify and because the right protects interests other than the defendant's. Id. at 1909-10. Thus, not every violation will be harmful to the defendant. Id. at 1910.

The Court then addressed the remedy when structural error occurs, particularly when the error is claimed in the context of ineffective assistance of counsel. It noted that "the term 'structural error' carries with it no talismanic significance as a doctrinal matter." Id. The Court then held that prejudice must be shown

even as to a violation of the public trial right, because not all such errors render a trial fundamentally unfair or deprive the defendant of a better result.

> As explained above, not every public-trial violation will in fact lead to a fundamentally unfair trial. ... Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, ... to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Weaver, 137 S. Ct. at 1911 (internal citations omitted). "The prejudice showing is in most cases a necessary part of a Strickland claim [because] ... a defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" Id. at 1910-11. "As a rule...a violation of the Sixth Amendment right to effective assistance of counsel is not 'complete' until the defendant is prejudiced." Id.

This reasoning applies here. As WACDL concedes, lawyers with a diagnosed mental illness can fairly and effectively try cases, meaning that not every case involving a lawyer with mental illness results in an unfair trial. Thus, a defendant claiming mental health

deficiencies must establish a substantial likelihood that particular deficiencies in counsel's performance resulted in an unfavorable outcome.

WACDL argues that a mentally ill lawyer is like a sleeping lawyer and that courts do not require proof of prejudice when trial counsel was sleeping. Amicus Brief, at 11 (citing Javor v. United States, 724 F.2d 831 (9th Cir. 1984)). Members of this Court have also recently commented that proof of a sleeping lawyer might be sufficient to overturn a conviction with a showing of prejudice. In re Caldellis, 187 Wn.2d 127, 146 n.6, 385 P.3d 135, 145 (2016) (citing Javor and Burdine v. Johnson, 262 F.3d 336, 348 (5th Cir. 2001)) and In re Pers. Restraint of Lui, 188 Wn.2d 525, 573-74, 397 P.3d 90 (2017) (Madsen, J. dissenting). Neither the federal appellate decisions nor this Court's comments apply here.

The rationale in Javor and Burdine rests on the following reasoning. The total absence of counsel at critical stages of the trial is deemed a structural error that does not require a showing of prejudice. United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Defense counsel in Burdine "repeatedly dozed and/or actually slept during substantial portions of [Burdines's] capital murder trial so that counsel was, in effect,

absent." Burdine, 262 F.3d at 340 (2001). Defense counsel in Javor "was asleep or dozing, and not alert to proceedings, during a substantial part of the trial of petitioner..." Javor, at 882. A sleeping lawyer is functionally absent because he cannot observe witnesses, listen to testimony, pose objections, prepare cross-examination, consider rebuttal evidence and prepare argument. Javor, at 724 F.2d at 832. Thus, a defendant need not show prejudice under Strickland when his lawyer slept during significant portions of the trial.

A lawyer diagnosed with a mental illness is not akin to a sleeping lawyer. A sleeping lawyer is necessarily unable to engage in the proceedings, to perceive information through his senses, and to process that information and develop strategy. The same cannot necessarily be said of a lawyer suffering from depression. Thus, Lopez is not entitled to a presumption of prejudice, he must prove it. WACDL's argument for a presumption of prejudice must be rejected.

Witchley, in particular, was as far from a sleeping lawyer as one can imagine. He was active, aggressive, and engaged throughout the trial. He effectively litigated motions, lodged objections, cross-examined witnesses, and presented cogent

arguments. The trial court praised his trial performance three times. The only defect the trial court could find was his failure to present evidence of his reputation for sexual decency. 11RP 1282-83 ("...I have to say, quite candidly,...Mr. Witchley, despite his tardiness, for the most part did a good job. But I am concerned about this one area."). Thus, Lopez did not have an effectively-absent lawyer as did the defendants in Javor and Burdine. He had able counsel. His Sixth Amendment claim must be rejected.

C. CONCLUSION

For the foregoing reasons, this Court should reject WACDL's argument for a different standard of review and its argument that prejudice must be presumed simply because trial counsel made a mistake while diagnosed with a mental health condition.

DATED this 26th day of October, 2017.

Respectfully submitted,

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