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NO. 68974-6-I

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

REC'D
JAN 22 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

FLOYD A. TYLER, JR.,

Appellant.

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

The Honorable Patrick Oishi, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel deprived the appellant, Floyd A. Tyler, Jr., of his constitutional rights to the effective assistance of counsel.

Issue Pertaining to Assignment of Error

Was trial counsel ineffective for failing to object to irrelevant evidence where counsel's failure was not reasonably strategic, the trial court would likely have sustained the objection, and admission of the evidence affected the jury's guilty verdict to the crime of first degree rape of a child?

B. STATEMENT OF THE CASE

Floyd Tyler was "like a brother" to Tiffani Gilkison, and began dating Gilkison's sister, Melissa, in about 1995. 1RP 239-41. Gilkison had a girl, K.G., in 1996. 1RP 327. She later had two other daughters. 1RP 237.

During the years 2003 through 2005, Gilkison lived in a house with her children as well as Tyler, Melissa, and their son. 1RP 240-41. Melissa watched the children while Gilkison worked and K.G. went to school. 1RP 241-42, 245-48. Tyler sometimes watched the kids himself during this time period. 1RP 248-49, 354-55. K.G. described Tyler as "like a big brother in a sense." 1RP 354.

One night when Tyler was alone babysitting the children, he and K.G. watched television while the younger children played in a nearby hallway. 1RP 357-58. The children were close enough to hear K.G. and Tyler. 1RP 359-60, 377. After a while, Tyler suggested he and K.G. play a game called Truth or Dare. 1RP 358-59. After a few simple dares, Tyler said "if you give me pleasure I'll give you pleasure." 1RP 360. Tyler unzipped his pants, pulled out his penis, and put it in K.G.'s mouth for a few seconds. 1RP 361-62. After he pulled it out, Tyler pulled K.G.'s pants down and put his mouth on her "privates" for several seconds. 1RP 362-63. K.G. then went into the hallway and played with the younger children. 1RP 364.

Tyler, meanwhile, went into a different room and called for K.G. 1RP 381. She came into the room, which was dark. Tyler, who did not have his pants on, pulled K.G.'s pants down and sat her on his lap. K.G. felt Tyler's bare penis on her "butt." 1RP 364-66, 382. After about 15 or 20 seconds, K.G.'s younger sister ran into the room. K.G. jumped up, pulled up her pants, and ran out. 1RP 366-67, 382. She was about eight years old at the time. 1RP 369, 386.

K.G. did not disclose the incidents because she thought no one would believe her. Nor did she discuss the matter with Tyler, who continued to stay at the house. 1RP 367-69, 386.

When she was about 10 years old, K.G. and her family moved out of the house and no longer lived with Tyler and Melissa. 1RP 295, 386-88. K.G. thereafter saw Tyler less frequently. 1RP 296, 388-89. It did not seem to Gilkison that K.G. feared Tyler. 1RP 293-94, 297-98. Nor did K.G. give her mother any indication she had been abused. 1RP 288.

When K.G. was 14 years old, her friend revealed that her uncle molested her. K.G. then disclosed what happened to her with Tyler. The friend encouraged K.G. to tell her mother, so she did. 1RP 291, 371-72. Gilkison "freaked out," then sought advice from her mother, her boyfriend, and a sexual assault hotline. She did not, however, call the police. 1RP 284-85.

Later that day, Gilkison and K.G. went to a store and unexpectedly saw Tyler there. A shocked K.G. left and sat in Gilkison's car. 1RP 286-87, 372. Gilkison confronted Tyler and told him what K.G. had revealed. Tyler said "that was crazy." 1RP 287. His response led Gilkison to call the police, but not until about a week later. 1RP 287. A police officer went to Gilkison's residence and took statements from K.G. and her

mother. 1RP 230-34. About a month later, K.G. gave a more formal statement to a detective and prosecutor. 1RP 402-03.

After additional investigation, a detective spoke with Tyler on the phone and later interviewed him at his office. 1RP 403-04. Tyler denied molesting K.G. or playing Truth or Dare with her. 1RP 404-07. He was not arrested. 1RP 407.

He spoke with police again four months later. 1RP 409-10. After initially denying anything occurred, Tyler explained K.G. forcefully pulled his pants down and grabbed his penis after he said no. Her lips touched the end of his penis before he pulled away and put his pants back on. 1RP 307-09, 323, 416. When asked why he initially denied the incident occurred, Tyler said "if he blocked it out then it did not happen." 1RP 308.

The State ultimately charged Tyler with first degree child rape committed against K.G. between March 2003 and March 2005. CP 8. Tyler's defense was general denial. He called his two sisters to testify on his behalf. Like Tyler, the sisters had known the Gilkisons for a long time. 1RP 434-35, 438-39, 449. Neither sister noticed anything unusual in the way K.G. interacted with Tyler. 1RP 437, 444-45, 451-53.

A jury found Tyler guilty as charged. CP 9. The trial court sentenced Tyler to a standard range minimum term of 108 months and a maximum term of life. CP 33-43.

C. ARGUMENT

TRIAL COUNSEL'S FAILURE TO OBJECT TO IRRELEVANT AND PREJUDICIAL EVIDENCE DEPRIVED TYLER OF HIS RIGHT TO EFFECTIVE REPRESENTATION.

After eliciting evidence that Tyler told a police officer he had not ejaculated with K.G., the prosecutor asked whether he said he ejaculated at any point shortly thereafter. 1RP 309. Defense counsel did not object to this question. The officer answered by stating Tyler said he masturbated to ejaculation about 10 or 15 minutes later, when K.G. was not around. 1RP 309-10. Later during trial, a second officer who had heard the interview repeated Tyler's statement, again without defense objection. 1RP 412. Counsel's failure to object was ineffective assistance.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic

decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

a. Counsel's failure was not reasonably tactical.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining the conduct. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

There was no legitimate tactical reason for Tyler's counsel to allow the officers to answer the prosecutor's question. Timely objections to the question would have prevented the answers. There thus would have been no reasonable concern that an objection would highlight the evidence. See Davis, 152 Wn.2d at 714 (failure to object was legitimate trial strategy because "[c]ounsel may not have wanted to risk emphasizing the testimony with an objection."); State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997) (failure to object could have been a "tactical decision" to prevent

calling added attention to apparent discrepancy in defendant's statements), review denied, 134 Wn.2d 1003 (1998).

Moreover, the evidence came in separately during the testimony of two different officers. The evidence was therefore already highlighted and a timely objection would not have called the jury's attention to isolated evidence that could otherwise have been easily overlooked.

- b. The trial court would have likely sustained timely objections.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401; State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Whether or not Tyler ejaculated at some time other than when he was with K.G. was not relevant to any fact of consequence at trial. Ejaculation during the incidents could have been relevant to show motive, intent, and absence of mistake or accident, or to rebut Tyler's explanation that K.G. forced the intercourse and acted quickly enough to briefly

accomplish the sexual contact. Ejaculation later, however, had little if any probative value and not enough to outweigh the prejudicial effect. It is therefore likely the trial court would have sustained timely objections to the prosecutor's questions.

- c. It is reasonably likely admission of the evidence affected the jury's verdict.

The improper evidence undermined Tyler's theories that K.G.'s version of events was not reasonable and that his statements to the police were the product of panic and not true. 1RP 481-88. Although motive was not an element of the crime at issue, the evidence gave jurors an explanation for *why* Tyler would engage in such conduct: it excited him, aroused him, "turned him on." Indeed, it excited him so much he masturbated to ejaculation shortly thereafter.

This feature of the irrelevant evidence was hardly lost on the prosecutor. During closing argument, the prosecutor wondered aloud "what was going through [Tyler's] mind when he thought about what he just did to [K.G.]." 1RP 467. The prosecutor continued,

We can never [k]now exactly what someone is thinking, but we know a little bit about what was going through the Defendant's head after he had his penis pressed against [K.G.'s] buttocks. Because we know that ten to fifteen minutes after that happened, the Defendant was off somewhere else masturbating to ejaculation.

1RP 467-68.

By so arguing, the prosecutor aggravated the prejudicial nature of the improper evidence. In other words, the prosecutor increased the likelihood the improper admission of the evidence affected the jury's verdict. See State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002) (prosecutor "exacerbated" trial court's erroneous introduction of bad acts evidence by arguing from the evidence during closing argument); State v. Severns, 13 Wn.2d 542, 552, 125 P.2d 659 (1942) (prosecutor aggravated trial court's erroneous jury instruction, which included uncharged alternative method of committing offense, by arguing evidence could have supported conviction based on alternative).

This likelihood is even greater where, as here, the trial boils down to a swearing match between the complainant and defendant. See State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993) ("In the end, the case essentially turned on the credibility of the two witnesses. In such a swearing contest, the likelihood of the jury's verdict being affected by improper questioning is substantial.").

Finally, the State's case was not especially strong. Importantly, no one, including K.G.'s mother, suspected the child had been abused. K.G.'s behavior toward Tyler did not change. Nor did her own behavior change. She was not, for example, more angry, depressed, or withdrawn. When

she was 13 or 14 and before her disclosure, K.G. falsely posted on Facebook that she almost got "raped" at a water park and that a group of boys was following her around. 1RP 390-91. And although she regularly saw Tyler for another two years, K.G. said nothing sexually improper ever happened again between them. 1RP 368, 386-87.

For these reasons, the irrelevant evidence likely affected the jury's guilty verdict. Tyler has established ineffective assistance of counsel and his conviction should be reversed.

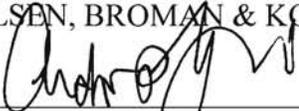
D. CONCLUSION

For the above reasons, this Court should reverse Tyler's conviction and remand for a new trial.

DATED this 22 day of January, 2013.

Respectfully submitted,

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

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| STATE OF WASHINGTON |) | |
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| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 68974-6-1 |
| |) | |
| FLOYD TYLER, JR., |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF JANUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FLOYD TYLER, JR
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191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JANUARY, 2013.

X Patrick Mayovsky

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