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NO. 68974-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FLOYD A. TYLER, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE PATRICK OISHI

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

CHRISTINA MIYAMASU
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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A. ISSUE PRESENTED

To show ineffectiveness of counsel, a defendant must show that counsel's representation was actually deficient and that he was prejudiced by such deficiency. Counsel declined to object when witnesses testified that Tyler stated he masturbated to ejaculation 10-15 minutes after the eight-year-old victim had her lips on his penis. Has Tyler met his burden of showing ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Floyd A. Tyler, Jr. was charged by Information in King County Superior Court with rape of a child in the first degree. CP 1, 8. A jury convicted Tyler as charged. CP 9. Tyler appealed. CP 49.

2. SUBSTANTIVE FACTS

When K.M.G. was eight years old, her aunt, her aunt's boyfriend, Tyler, and their son lived with K.M.G, her mother, and her two younger sisters. RP 241-42, 327-34, 347-50, 353, 369. During that time, K.M.G.'s mother worked as a cocktail waitress in the

afternoons and evenings and her aunt watched the kids while she worked. RP 245, 350-51.

One night, K.M.G.'s mother and aunt, and their mother went to the Muckleshoot Casino leaving all of the children with Tyler to babysit. RP 248-49, 356-57. Tyler was lying in bed with K.M.G. sitting at the end of the bed when K.M.G. suggested they play "Go Fish." RP 358. Tyler wanted to play something more interesting and told K.M.G. that they should play "Truth or Dare" instead. RP 358. K.M.G. had played the game before and agreed. RP 359.

The game started with little things when Tyler said, "If you give me pleasure, I'll give you pleasure." RP 359-60. Tyler asked K.M.G. to put his "privates" in her mouth. RP 360-61. Tyler stood at the end of the bed, unzipped his pants, and pulled his pants down. RP 361. Tyler instructed K.M.G. to open her mouth. RP 362. When K.M.G. complied, Tyler inserted his penis into K.M.G.'s mouth. RP 362. Tyler kept his penis in K.M.G.'s mouth for five to ten seconds. RP 362. K.M.G. could not remember if Tyler told her to do anything with his penis in her mouth. RP 362. Tyler then put his mouth on K.M.G.'s "privates." RP 361, 363. Tyler got up and told K.M.G. to come into his son's room with him. RP 364-65. When she followed him into the room, he pulled down her pants and underwear and sat

her on his lap. RP 365. Tyler's pants were down and K.M.G. felt a pinching sensation as Tyler's penis pressed into her buttocks.

RP 365-66. They were interrupted by K.M.G.'s little sister coming into the room crying. RP 367. K.M.G. jumped up, pulled up her pants, and went out of the room with her sister. RP 367. K.M.G. did not tell anyone what had happened that night. RP 367.

In July, 2010, K.M.G. confided in her friend Khadija about what had happened with Tyler. RP 370. Khadija encouraged K.M.G. to tell her mother about the incident, which she did a short time later. RP 283-84, 372. Not knowing what to do, K.M.G.'s mother called her boyfriend for advice and later called a crisis line. RP 284. Still uncertain about what to do, the mother did not immediately call the police. RP 285. In the days that followed, she and K.M.G. were at the grocery store when they saw Tyler. RP 286, 372. K.M.G. wanted nothing to do with the confrontation that she knew was coming, so she went to the car to wait. RP 286, 372. When Tyler approached K.M.G.'s mother, she told him that she knew what he had done to K.M.G. all those years ago. RP 287. Tyler denied it, saying that was crazy. RP 287.

A week after the disclosure, K.M.G.'s mother called the police to report the incident. RP 287. K.M.G. provided a statement to a

patrol officer who came to her home and later to the case detective, Detective Gee, and a prosecutor in a joint interview. RP 288, 290, 373-74. The detective also spoke with Tyler, who agreed to come to the police station to provide a recorded statement. RP 403-04. During the interview, Tyler denied any wrongdoing and agreed to a follow-up interview. RP 405-09.

Detective Steve Kelly conducted Tyler's follow-up interview. RP 301-02. At the start of the interview, Tyler again denied any wrongdoing. RP 307. Later in the interview, Tyler told Detective Kelly that K.M.G. wanted to put her mouth on his penis and he said no. RP 308, 411-12. Tyler further stated that K.M.G. pretty much forced herself on him, pulling down his pants, grabbing his penis, and putting her lips on the tip of his penis before he could pull away and pull up his pants. RP 308, 411-12. Tyler stated that he had lied to Detective Gee earlier because he was trying to block out the incident. RP 308, 412-13. Detective Kelly summarized what Tyler had told him and Tyler agreed with the summary. RP 308. When asked if he ejaculated with K.M.G., Tyler stated that he did not ejaculate with K.M.G. but he did masturbate to ejaculation about 10-15 minutes later when K.M.G. was not around. RP 309-10, 412-13. After the follow-up interview with Detective Kelly, Tyler provided a recorded

statement to Detective Gee where he repeated the same story about K.M.G. forcing herself on him. RP 415-17; State's Exhibit 7 and 8. During the recorded statement, Tyler denied ejaculating 10-15 minutes after putting his penis in K.M.G.'s mouth. RP 423-24. Instead, he stated that he did not ejaculate until later that night with his girlfriend, K.M.G.'s aunt. RP 424.

All of the above-mentioned witnesses testified at trial. Tyler's sisters testified that they did not notice any change in behavior by K.M.G. after the incident occurred. RP 431-60. Tyler did not testify. In closing, defense counsel argued that Tyler lied to the police about K.M.G. forcing herself on him because he "panicked." RP 487-88. He also pointed out that Tyler's statement about masturbating to ejaculation 10-15 minutes after K.M.G. put her mouth on his penis was not on Tyler's recorded statement. RP 489.

C. ARGUMENT

TYLER HAS FAILED TO ESTABLISH THAT COUNSEL WAS INEFFECTIVE.

Tyler contends that his trial counsel was ineffective for failing to object to testimony that he admittedly ejaculated 10-15 minutes after K.M.G.'s lips touched his bare penis.

To prove that a failure to object constitutes ineffective assistance of counsel, a defendant “must show that not objecting fell below prevailing professional norms, that the proposed objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.” In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Prejudice is present if there is a reasonable probability that, but for counsel’s error, the result would have been different. Id. at 334-35. Judicial scrutiny of counsel’s performance must be highly deferential. Strickland, 466 U.S. at 689.

“Relevant evidence” is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence.” ER 401. All relevant evidence is admissible, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 402; 403.

Here, Tyler claimed to detectives that K.M.G. forced her lips onto his penis before he could pull away and stop her. This statement is undermined by his later admission that 10-15 minutes after it happened, with no intervening activities, he masturbated to ejaculation. Tyler’s admission about masturbating to ejaculation makes his statement that K.M.G. initiated the contact less probable and thus admissible under ER 401, 402, and 403. Moreover, Tyler’s ejaculation within close proximity to the contact, with no indication that he engaged in any other activities in the time intervening, is relevant to his motive, intent, and absence of mistake in engaging in sexual intercourse with K.M.G.

The bare fact of masturbation to ejaculation is not unfairly prejudicial. It is Tyler’s masturbation in close proximity to his sexual contact with a young girl that makes it probative and admissible. Even if this court were to find the relevance of the statement somehow substantially outweighed by unfair prejudice, given the strength of the State’s evidence, including Tyler’s statement that

eight-year-old K.M.G. pulled down his pants and underwear, got a hold of his penis, and forced her lips onto it before he could stop her, the result of the trial would not have differed.

Clearly, the jury did not find Tyler's account of being the "victim" of an eight-year-old girl credible. There is no reasonable probability that if the statement regarding masturbation had not been admitted, the result would have been different.

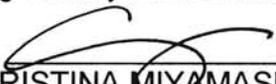
D. CONCLUSION

Tyler has failed to show there was a viable objection such that counsel was ineffective for failing to make it. Even if he could make such a showing, in the context of the rest of the State's evidence, he cannot show that the failure to object prejudiced him. For these reasons, the State respectfully requests that this Court affirm Tyler's conviction.

DATED this 15th day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
CHRISTINA MIYAMASU, WSBA #36634
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FLOYD TYLER JR., Cause No. 68974-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

Holly Gilmore
Name Holly Gilmore
Done in Kent, Washington

3.15.2013
Date 3-15-2013