

69626-2

69626-2

NO. 69626-2-I

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

In re Detention of Michael E. Pittman

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL E. PITTMAN,

Appellant.

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

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel deprived Michael E. Pittman of his right to effective assistance during his commitment hearing under chapter 71.09 RCW.

Issue Pertaining to Assignment of Error

To indefinitely commit a sex offender to the Special Commitment Center, the State must prove the offender is likely to engage in predatory acts *of sexual violence* if not securely confined. In accord with the statutory definition, jurors were instructed "sexual violence" included "indecent liberties by forcible compulsion." But the court instructed the jury that one could commit indecent liberties by forcible compulsion not only by using forcible compulsion, but also by having sexual contact with someone incapable of consent because of mental incapacity or physical helplessness. Was defense counsel ineffective for failing to object to this expanded notion of indecent liberties by forcible compulsion?

B. STATEMENT OF THE CASE

In 1997, Michael E. Pittman became a friend of an 11-year-old boy's family. Pittman was homeless at the time and slept in the boy's neighborhood. One day during late summer, Pittman and the boy drank alcohol together and played a "farting game" in an isolated area of the neighborhood. Pittman told the victim to remove his pants after which he

fellated the boy while masturbating. 5RP 92-94. He then threatened to harm the boy if he disclosed the incident. The boy went home and told his mother. Pittman was quickly arrested. At the time of his arrest, Pittman had cutout pictures of boys in the same age range in his wallet. 5RP 94-95. As a result, Pittman was convicted in 1998 of first degree rape of a child and sentenced to 147 months incarceration. 4RP 82-84; Ex. 10. Pittman denied committing the crime and explained to a psychologist he was the victim of a "witch hunt." 5RP 102.

Throughout the course of his incarceration, Pittman was often found in possession of child-centered materials, including hand-drawn illustrations, an index of young actors and the movies in which they had appeared, and pictures of young boys that had been cut out of magazines, newspapers, and advertisements. 3RP 13-24, 35-36; 4RP 5-8, 10-14, 22-24, 29-30, 39-45, 61-64, 70-80, 114-18, 143-45; 5RP 7-12, 26-34, 41-43, 55-56, 59-60, 103. Pittman told a DOC staff member he created the index because he was trying to make a "Trivial Pursuit"-type game. 5RP 105-06; 6RP 42-43. The DOC considered this material "pornography" given Pittman's background and conviction. 4RP 46-47, 71-72. He was routinely sanctioned for being in possession of such materials. 3RP 22-23; 4RP 22-23, 73-74; 5RP 43.

Pittman also frequently requested to be moved into cells with younger-looking inmates. 3RP 39-41; 5RP 103-05. Officials also confiscated several letters Pittman wrote to "pen pals," including one to a woman who apparently had two small children. In the letter Pittman asked questions such as how old the children were, what they looked like, what type of clothing they liked to wear, and what activities they enjoyed. 4RP 21-22. On one occasion in 2012, a guard at the Special Commitment Center observed Pittman fast-forwarding through a recorded movie and stopping at parts when adolescents were being shown. 5RP 48-51.

Psychologist Lyne Piché wrote evaluation reports in spring 2010 and fall 2011. Pittman did not speak with Piché before the 2010 report, but did before the 2011 report under court order. CP 75-76; 5RP 76-77. Piché interviewed Pittman for about five hours and reviewed DOC records and police reports and court documents regarding Pittman's conviction and three other reported instances of sexual misconduct with young boys that did not result in convictions. 5RP 79-82. The trial court instructed jurors that hearsay information Piché relied on to form her opinion could not be used for the truth of the matters asserted, but only in determining credibility and weight of the evidence. 5RP 78.

Piché detailed two other alleged sex offenses. In one incident, occurring between 1991 and 1993, Pittman again played the "farting game" with a 12-year-old boy, offered to provide alcohol and drugs, and had the boy rub his penis on Pittman's face while Pittman masturbated. 5RP 98-99. Pittman was charged with second degree child molestation, but not convicted. 5RP 98. The other matter involved a 10-year-old boy. Pittman befriended the boy's family, eventually acted as a baby sitter, and fondled the boy's genitals when the boy pretended he was asleep. 5RP 99-100. This happened regularly for about one year. 5RP 101; 6RP 75-76. The boy did not report the incidents until he was 17 or 18. Police investigated, but Pittman was not charged. 5RP 100.

Piché diagnosed Pittman with pedophilia. She said the diagnosis required three findings. First, there had to be recurring, intense, sexually arousing fantasies, urges or behaviors involving sexual activity with prepubescent children for at least six months. Second, the subject must have acted on the urges or fantasies, or have suffered marked distress and personal difficulty resulting from the urges or fantasies. Third, the subject had to be at least 16 years old and at least five years older than the child. 5RP 88.

She relied on the conviction and alleged offenses, the continuing collection of pictures of children in the same age range as the boys Pittman targeted, his attraction to young-looking prison inmates, and his disclosure that there were times when he felt like he could not control some of his behaviors. 5RP 89, 103-09. Piché was aware a pedophilia researcher wrote that about 40 percent to 50 percent of those who sexually offend against children do not qualify as pedophiles. 7RP 9-13

Piché also diagnosed Pittman with antisocial personality disorder and borderline personality disorder. 5RP 111-130. In finding the first disorder, Piché relied on Pittman's criminal history, purported lying and use of aliases, impulsivity, reckless disregard for the safety of others, inability to maintain employment inside or outside prison, and lack of remorse. 5RP 113-20. Piché acknowledged that 50 percent to 80 percent of prison inmates could be diagnosed with antisocial personality disorder. 7RP 13. With respect to the borderline personality finding, Piché cited to Pittman's frequently changing religious preferences, frequent displays of anger, feeling that people are against him, and difficulty establishing relationships. 5RP 124-30. Combined with the pedophilia, Piché explained, the personality disorders made it more likely Pittman would reoffend. 5RP 133-34.

Piché employed commonly used instruments designed to predict future risk. 5RP 142-56. According to one instrument, Pittman's likelihood of being convicted for a sex offense was 17 percent to 23 percent within five years and 26 percent to 34 percent within 10 years. 5RP 148-50. The second instrument predicted the likelihood of committing a "violent" act, which included sexual violence, within seven years and ten years. 5RP 155. Pittman's chance of committing a violent act was 58 percent over seven years and 80 percent over 10 years. 5RP 155-57.

Combining this data with the other things she reviewed, Piché concluded Pittman was a high risk to sexually reoffend. 6RP 27. She also found Pittman met the criteria for commitment as a sexually violent predator. 6RP 31.

Pittman did not testify at trial. During closing argument, Pittman's counsel maintained the State failed to show that if released, Pittman would more probably than not commit a predatory act of sexual violence. 7RP 64-66, 68-71, 77-78. The jury disagreed, finding the State proved beyond a reasonable doubt that Pittman is a sexually violent predator. CP 5. As a result, the trial court entered an order committing Pittman to the Special Commitment Center. CP 4.

C. ARGUMENT

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE TRIAL COURT'S IMPROPER "INDECENT LIBERTIES BY FORCIBLE COMPULSION" INSTRUCTION.

To commit a sex offender under chapter 71.09 RCW, the state must prove beyond a reasonable doubt the offender "has been convicted of or charged with a crime of sexual violence *and* [] suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of *sexual violence* if not confined in a secure facility." RCW 71.09.020(18) (emphasis added); In re Detention of Coe, 175 Wn.2d 482, 490, 286 P.3d 29 (2012)

In turn, a "sexually violent offense" is defined as (a) first degree rape, second degree rape by forcible compulsion, first degree or second degree child rape, first degree or second degree statutory rape, indecent liberties *by forcible compulsion*, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a comparable felony offense in effect at any time before July 1, 1990; (c) several offenses if committed with sexual motivation; and (d) an attempt, criminal solicitation, or criminal

conspiracy to commit one of the above designated felonies. RCW 71.09.020(17).

This Court has found that by clearly setting forth the acts that qualify as a "sexually violent offense," the legislature's intent is to limit the group of offenders who qualify as sexually violent predators. In re Detention of Boynton, 152 Wn. App. 442, 453, 216 P.3d 1089 (2009), review denied, 168 Wn.2d 1023 (2010). See In re Detention of Lewis, 163 Wn.2d 188, 196, 177 P.3d 708 (2008) (where statute specifies the things or classes of things to which it applies, courts infer that all things or classes of things not specified were intentionally omitted by legislature).

With respect to the "likely to engage in predatory acts of sexual violence" requirement in Pittman's case, indecent liberties is a sexually violent offense only when committed by forcible compulsion or against a child under age 14. The parties and court agreed to strike the "under age 14" means of committing indecent liberties in the pertinent jury instructions, which left the "forcible compulsion" means as the only act of indecent liberties the jury could consider as a sexually violent offense. 7RP 4-6 (discussion regarding instructions 7 and 15). As a result, the trial court instructed the jury in pertinent part as follows:

"Sexual violence" or "harm of a sexually violent nature" means: rape in the first degree, rape in the second degree by

forcible compulsion, rape of a child in the first or second degree, indecent liberties by forcible compulsion, and child molestation in the first or second degree.

CP 15 (instruction 7). The court defined "forcible compulsion," in turn as "physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped." CP 21 (instruction 13). This definition comports with RCW 9A.44.010(6).

But when instructing regarding indecent liberties by forcible compulsion, the trial court significantly expanded the types of acts that could constitute the crime. Instruction 15 provided:

A person commits the crime of indecent liberties *by forcible compulsion* when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion, *or* when the other person is incapable of consent by reason of being mentally defective or mentally incapacitated, *or* when the other person is incapable of consent by reason of being physically helpless.

CP 23 (emphasis added). Using forcible compulsion or victimizing someone who is incapable of consenting because of mental or physical incapacity are alternative means of committing indecent liberties. See State v. Ortega-Martinez, 124 Wn.2d 702, 708-09, 881 P.2d 231 (1994)

(forcible compulsion and victim's incapacity to consent alternative means of committing second degree rape).

The court's instruction is an erroneous statement of the law. Because only indecent liberties by forcible compulsion is "sexual violence," the single sentence that makes up instruction 15 should have ended before the first "or." By expanding the types of conduct that make up indecent liberties by forcible compulsion, the trial court improperly lessened the State's burden of proving Pittman was "likely to engage in predatory acts of sexual violence if not confined in a secure facility."

Stated another way, the expanded definition of forcible compulsion gave the jury the option of finding Pittman was likely to engage in acts of indecent liberties upon an incapacitated victim, which would not be possible under the more narrow definition. The bottom line is that instruction 15 misstates the law.

Defense counsel did not, however, except to the instruction. Pittman thus cannot challenge the instruction directly. State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Pittman therefore asserts trial counsel was ineffective for failing to object to the faulty instruction. State v. Gerdts, 136 Wn. App. 720, 726, 150 P.3d 627 (2007).

A 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). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

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

a. Counsel's failure to object was deficient.

Reasonable attorney conduct includes an obligation to investigate pertinent law. State v. Woods 138 Wn. App. 191, 197-98, 156 P.3d 309 (2007). Therefore, proposing an incorrect instruction, even when it mirrors a pattern instruction, may constitute ineffective assistance. Id. The same is true of a failure to object to an improper instruction. State v. Howland, 66 Wn. App. 586, 595, 832 P.2d 1339 (1992) (counsel deficient for failing to "notice" inaccurate jury instruction that expanded ways to commit first degree felony murder), review denied, 121 Wn.2d 1006 (1993).

Pittman's trial counsel failed to object to the trial court's instruction setting forth the ways of committing indecent liberties by forcible compulsion. The instruction effectively made it easier to find Pittman was likely to commit a predatory act of sexual violence if not committed under chapter 71.09 RCW. "There is no legitimate strategic reason for allowing an instruction that incorrectly states the law and lowers the State's burden of proof." In re Personal Restraint of Wilson, 169 Wn. App. 379, 391, 279 P.3d 990 (2012) (counsel proposed faulty pattern jury instruction that permitted jury to hold accomplice strictly liable for any and all crimes the principal committed).

Counsel for Pittman made a similar error that, for the same reasons, was not reasonably strategic. Counsel's failure to object to the erroneous instruction was deficient performance. State v. Carter, 127 Wn. App. 713, 718, 112 P.3d 561 (2005).

b. Counsel's deficient performance prejudiced Pittman.

Prejudice is established where it is reasonably probable that, but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is one that is sufficient to undermine confidence in the jury's verdict. Strickland, 466 U.S. at 694.

In this case counsel's failure to object to the expanded definition of indecent liberties by forcible compulsion undermined confidence in the jury's conclusion. As explained, a correct definition of indecent liberties by forcible compulsion does not include taking indecent liberties with a mentally incapacitated person or when the other person cannot consent due to physical helplessness.

This is important, because Dr. Piché testified that during an unspecified time period, a 10-year-old boy reported Pittman routinely fondled his genitals when he pretended he was asleep. 5RP 99-101; 6RP 75-76. "The state of sleep appears to be universally understood as

unconsciousness or physical inability to communicate unwillingness" as applied to the "physically helpless" means of committing indecent liberties. State v. Puapuaga, 54 Wn. App. 857, 861, 776 P.2d 170 (1989). Therefore – regardless whether the boy was actually asleep – Pittman purportedly showed a willingness to repeatedly fondle a boy who at least appeared physically helpless.

The trial court instructed the jury it "must not consider [Dr. Piché's] testimony as proof that the information relied upon by the witness is true. You may use this testimony only for the purpose of deciding what credibility or weight to give the witness's opinion." CP 10 (instruction 2). It was Dr. Piché's opinion that Pittman was likely to commit a predatory act of sexual violence if not committed. The jury was instructed "likely to engage in predatory acts of sexual violence" means the probability "exceeds 50 percent." CP 17 (instruction 9). Piché's opinion conflicted with her testimony that according to the results of an actuarial test, Pittman's likelihood of being convicted for a sex offense was 17 percent to 23 within five years and 26 percent to 34 percent within 10 years. 5RP 148-50. Defense counsel hammered on this point in closing argument. 7RP 64-66, 69-71, 74, 77-78.

The court's improperly expanded definition of indecent liberties by forcible compulsion added weight to Piché's opinion regarding likelihood of reoffense. Additionally, regardless of the limiting instruction, it is reasonable to believe the details of the purported molestation of the "sleeping" boy influenced the jury to Pittman's detriment. See State v. Eaton, 30 Wn. App. 288, 292, 633 P.2d 921 (1981) ("There is a significant danger that jurors will consider prior convictions admitted for impeachment purposes as substantive evidence of guilt, regardless of instructions to the contrary.").

For these reasons, defense counsel's failure to object to the trial court's instruction caused prejudice. Pittman was thus deprived of his right to effective assistance of counsel. The trial court's commitment order should be reversed.

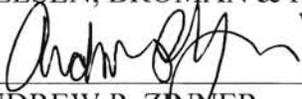
D. CONCLUSION

This Court should reverse the trial court's order committing Pittman under chapter 71.09 RCW and remand for a new trial.

DATED this 24 day of May, 2013.

Respectfully submitted,

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

In re Detention of :)
)
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 MICHAEL PITTMAN,)
)
)
)
 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 24TH DAY OF MAY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF MAY, 2013.

x *Patrick Mayovsky*