

FILED
March 9, 2016
Court of Appeals
Division I
State of Washington

NO. 73517-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ZIELINSKI,

Appellant.

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

The Honorable Tanya Thorp, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective assistance of counsel.

Issues Pertaining to Assignment of Error

The complaining witness claimed she was sexually assaulted repeatedly by her father, the appellant, between the ages of five and twelve. She made no such claims, however, until she was seventeen. The delay in reporting, she claimed, stemmed from her shame at having let it go on so long, and for not reporting anything earlier. As an example, she testified that when she was fifteen she saw the bed upon which the alleged abuse had occurred and commented to her mother that she wanted nothing to do with it, but did not tell her mother why. Without defense objection, the complaining witness's mother confirmed for the jury that her daughter said she wanted nothing to do with the old bed when she saw it at age fifteen, but never said why.

Was appellant denied his right to effective assistance of counsel when counsel's performance was deficient for failing to object to the mother's hearsay testimony, and were appellant was prejudiced by that failure because it made it more likely the jury would conclude the complaining witnesses claims were credible, and because it cuts directly against the defense theory that the allegations were fabricated?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Michael Zielinski (d.o.b. 9/30/66) with three counts of first degree child rape - domestic violence, and one count of second degree child rape - domestic violence. CP 95-97. The prosecution alleged Zielinski raped his daughter, A.G. (d.o.b. 7/2/96), in her bedroom numerous times between July 2, 2001, and July 1, 2009. CP 4-6.

Following a trial held March 30, 2015, though April 15, 2015, before the Honorable Tonya L. Thorp, a jury found Zielinski guilty as charged. CP 164-68; RP 793-94.¹ On May 15, 2015, the court imposed concurrent minimum sentences of 300 months for each first degree child rape conviction, and 280-month for the second degree child rape conviction. CP 228-39; RP 812. Zielinski appeals. CP 241.

2. Substantive Facts

a) *Family History & Background*

Zielinski married Annette Griffith² in 1992, and thereafter they had three children together: two sons, Z.Z. (d.o.b. 12/30/92) and J.Z.,³ and a

¹ There are five consecutively paginated volumes of verbatim report of proceedings referenced to collectively herein as "RP."

daughter, A.G.⁴ (d.o.b. 7/2/96). RP 228, 232, 598. They all lived together in a two-story home in Des Moines. RP 233, 246. All of the bedrooms were on the second floor, and the rest of the living area was on the first floor. RP 249-52. Both Zielinski and Griffith worked outside of the home; Griffith as a high school teacher and Zielinski operated a machine shop they owned and at which Griffith occasionally worked as well. RP 229-30, 252, 299-300, 318-19.

Griffith recalled they had a very hectic family life, given their jobs and the children's school and sport activities, of which there were many. RP 239-40. Although they tried to at least sit down as a family for dinner, that did not always work due to their schedules, which often had Griffith or Zielinski getting home late for various reasons. RP 240-42, 299-300, 311.

Griffith and Zielinski shared the routine of putting the children to bed each night, although depending on schedules one of them might have

² Annette's last name became "Griffith" after divorcing Zielinski in 2010, and marrying Matthew Griffith in 2013. RP 235, 237. For clarity, she will be referred to herein as "Griffith."

³ It does not appear a date of birth for J.Z. was ever established at trial. His mother, however, testified that he was 12 years old and in seventh grade at the time of trial, and that he was six years younger than A.G. RP 228, 230, 244.

⁴ Zielinski's daughter had changed her last name by the time of trial, which is reflected by the use of "A.G." instead of "A.Z." RP 392.

to do it alone. RP 245, 321. The routine included at the very least going in to each child's room, saying good night and tucking them in, but would also often include Griffith or Zielinski laying with them in bed until they fell asleep, particularly when the children were younger. RP 244-45. Griffith recalled that when she returned home late she would often find Zielinski asleep in J.Z.'s or A.G.'s bed. RP 243, 253. Sometimes she would wake him to come to her bed, other times she would let him wake up on his own, but he eventually always ended up in bed with Griffith. RP 253. Griffith admitted she too would sometimes fall asleep in the children's bed when she was tucking them in. RP 253-54.

Griffith recalled at trial that in the summer of 2003, several events occurred that had a negative effect on her relationship with Zielinski. RP 252. These events included the death of their four-year-old godson who Zielinski was very close to, the purchase of the machine shop business, which left them financially strapped, and a subsequent accident at that shop that caused "a serious brain injury" to one of their employees. RP 251-52, 298, 300.

Zielinski's drinking, which "was always a bone of contention" for Griffith, increased following their godson's death. RP 251-52, 298. This led to more heated arguments between them, arguments their children could hear and were afraid of. RP 298, 301. This led to Griffith leaving

with the children for several days in 2007 or 2008 as a way to encourage Zielinsk to seek treatment for alcohol abuse, which he did, so they all came back. RP 232.

On March 12, 2009, however, Griffith and the children moved out of the family home for good and into her parents' home in Federal Way, having concluded "it was no longer safe for the kids and I to stay in the house." RP 233. She told the children it was because of their father's drinking, but she also admitted she and Zielinski by then were arguing with increased frequency about their mounting financial problems. RP 298, 300-01, 304. Griffith stored much of hers and the children's furniture and other belongings in the garage of the Federal Way home. RP 269.

In March 2010, Zielinski moved to Wyoming. RP 235. On June 10, 2010, Zielinski's and Griffith's divorce was finalized. RP 235. Within weeks of the divorce, Griffith met Matthew Griffith⁵ on eHarmony.com and began dating him in July. RP 235-36.

Griffith and her children remained living at her parents' house until June 2012, when she, A.G. and J.Z.⁶ moved to a house in Burien. RP 238. They lived there for only 10 months, however, because Griffith and

⁵ For clarity, Matthew Griffith will be referred by his first name. No disrespect is intended.

⁶ Z.Z. stayed at the Federal Way home because it was closer to his school. RP 238.

Matthew became engaged in early 2013, and decided to moved together into the home Matthew had bought in Covington, along with their respective minor children (A.G. and J.Z. for Griffith and S.G. and C.G. for Matthew), about a week or so before their marriage on April 6, 2013. RP 238, 273.

Matthew was diagnosed with cancer in November 2013, and died in September 2014. RP 229, 274. Prior to his death, however, he adopted Griffith's children, and Griffith adopted his children. RP 228, 392, 599.

b) *A.G.*

Griffith described A.G. as "bright and confident" with a "strong sense of right and wrong" and always "loving." RP 255. Griffith noted A.G. did not have many friends her age growing up, tending instead to gravitate towards adults, even as a young child. RP 254. According to A.G., she had only one child friend between the ages of five and twelve. RP 549. Both A.G. and her older brother Z.Z. claimed A.G. was bullied a lot in school growing up. RP 503, 670.

Griffith considered A.G. "daddy's little girl" growing up because they enjoyed cooking together, whereas she and Z.Z. were "very sports minded." RP 255. Griffith denied Zielinski favored A.G. over the others, however, noting he just did different things with each child, like coaching Z.Z. in soccer, being goofy with J.Z., and cooking with A.G. RP 256.

Griffith recalled that beginning at about two years of age, A.G. started getting sick to her stomach every four to six weeks, and that this general sickliness continued throughout her childhood and into adulthood, although less severe since graduating high school in 2014. RP 230, 256-62, 266-68; see also RP 474-75 (A.G. admits she was a "very sick kid" and remains so in adulthood, albeit less severe). Several attempts were made to diagnose the cause, but without success, except to the extent it was determined stress exacerbates the condition. RP 257, 259, 261-62, 267, 475-76.

Griffith also noted her daughter had numerous other ailments growing up, including bladder and kidney infections in 7th, 8th & 9th grades, an ovarian cyst that was removed when she was a junior, and the occurrence of frequent nightmares after moving out of the family home in 2009. RP 268.

c) *The Allegations*

A.G. testified that on February 12, 2013, she admitted to her mother's fiancé, Matthew, that the relationship she had with her father was "more than just a normal father[-]daughter relationship," and that her father had touched her inappropriately. RP 504-05. She did not go into details at that time, but claimed it was the first time she felt comfortable enough to let someone know about what she claimed her father had done

to her in the past. RP 505-06. A.G. eventually went on to accuse her father of raping her three to four nights a week at bed time from the time she was in third grade until she moved to Federal Way with her mother and siblings in March, 2009. RP 423-25, 450, 471, 477, 571.

When asked why she had not reported the abuse sooner, A.G. claimed that when her father first started touching her she assumed it was just normal father-daughter behavior, and therefore she simply complied with her father's admonishment not to tell anyone. RP 417-18. Between the 5th and 7th grades, however, A.G. claimed she began to question the appropriateness of her father's treatment of her, but remained silent about it due to fear no one would believe her, or that her father would follow through with alleged threats to hurt her or other family member if she said anything. RP 414, 443, 451, 461, 479.

A.G. also claimed she had nightmares about her father raping her that started a couple of months after they had moved to Federal Way. RP 489. At trial she claimed the nightmares involved her father raping her and other family members being tortured or killed. RP 489-90. She said she told her mother about them about a year after they began, but never mentioned any connection between them and her father. RP 490-91.

A.G. also testified that in June 2012, when she, her mother and her younger brother were moving from Federal Way to Burien, seeing her old

bed from the Des Moines home had brought back memories of her father's alleged abuse. RP 238, 493-94. A.G. recalled that upon seeing the bed, "I told my mom I didn't want anything to do with my bed." RP 494. Although she did not tell her mother why she wanted nothing to do with it, and her mother did not question her about, she claimed it was because the bed made her afraid of reliving the ordeal. RP 494-95. She also claimed she said nothing about her father's alleged abuse then because she continued to be afraid she would not be believed, or would be in trouble for waiting so long, so she remained silent until February 12, 2013. RP 495, 504-05.

d) *Hearsay by A.G. Introduced by Griffith*

Griffith, A.G.'s mother, was the first witness to testify at trial. RP 227-329. According to Griffith, she never noticed anything odd about the relationship between A.G. and her father, and that A.G. always seemed comfortable around him, at least until she got older. RP 253-55, 307. She testified that in hindsight, however, there were indications something was amiss, but she never caught on. For example, Griffith did not consider it odd that Zielinski would fall asleep in A.G.'s bed some evenings, noting she herself would do so at times. RP 253. She also recalled A.G. having nightmares after they moved to Federal Way, nightmares her other two children never had. RP 268, 316. Similarly, Griffith testified about

noticing bruises on A.G. as she was growing up for which her daughter always had an innocent explanation, but she wondered now whether they were related to the alleged abuse. RP 281.

In this vein of inquiry, the prosecutor specifically broached the subject with Griffith of when she, A.G. and J.Z. moved from Federal Way to Burien in June 2012. RP 238, 268-73. The following colloquy occurred:

[Prosecutor]. Okay, so when you were preparing to move you and [J.Z.] and [A.G.] to the house in Burien, was there a discussion that you had with [A.G.] about some of the items [to be moved there]?

[Griffith]. Yes.

I was trying -- you know, I was -- we were kind of excited to be out on our own again, and so I called [A.G.]. I said, "Hey, you are going to be able to use your bed set again, " because it had been in storage, and she said, "I don't want anything to do with that bed."

And I said, "Do you want to talk about it?" And she said, "No, I'm not ready." And this was on a phone call.

And so I let it go.

[Prosecutor]. And did that strike you as odd or unusual at the time?

[Griffith]. It made me sad because I jump to conclusions and I realized she's -- she is carrying a burden that she wasn't ready to talk to me about.

RP 269-70. There was no defense objection.

Shortly thereafter, however, the following exchange occurred:

[Prosecutor]. Okay, now you were talking with her on the phone; without saying what specifically she said, how would you describe her demeanor or her tone when you were talking about this bed set?

[Griffith]. Just very short. No explanation, she just said, "I don't want anything to do with that bed."

[Defense Counsel]: Objection, hearsay, move to strike.

[Griffith]. I'm sorry, just short.

THE COURT: Sustained.
Ladies and gentlemen of the jury, you will disregard the statement attributed to not the testifying witness.

RP 272-73.

e) *Closing Arguments*

In closing, one theme for the prosecution was that A.G. had kept her father's alleged misconduct secret so many years because he told her to and out of fear no one would believe her if she told them, and only garnered the courage to finally reveal the truth when her mother's fiancé coaxed it out of her. RP 742-44, 755-58, 761. The prosecution claimed A.G. had no reason to make up allegations against her father so many years later, when he was already living out-of-state and was no longer in contact with her. RP 761-62.

In contrast, the defense noted A.G. was an unhappy and sickly child growing up whose father drank too much and whose parents fought too often and too loud. RP 767. When her parents divorced, A.G. was

left with a sense of loss and resentment towards her father. RP 768. To give herself a sense of empowerment and a basis to explain her otherwise sickly and unremarkable childhood, she eventually made false sex abuse allegation against Zielinski, almost as a prelude to her adoption by Matthew Griffith. RP 768-69. The defense also noted the implausibility of A.G.'s claim, such as she and her father having unprotected sex hundreds of times and never getting pregnant, or the fact that it was allegedly happening three to four times a week over several years, yet they never got caught. RP 770, 775. The defense also noted the complete lack of any physical evidence or eyewitnesses available to corroborate A.G.'s accusations. RP 771, 774.

One thing the prosecution and defense agreed on was that the outcome turned on the jury's assessment of A.G.'s credibility. RP 765-67, 787.

C. ARGUMENTS

1. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED ZIELINSKI OF A FAIR TRIAL.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution

is violated when the attorney's deficient performance prejudices the defendant such that confidence in the outcome is undermined. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 229, 743 P.2d 816 (1987).

Counsel's performance is deficient when it falls below an objective standard of reasonableness and is not undertaken for legitimate reasons of trial strategy or tactics. State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88; Saunders, 91 Wn. App. at 578. It is well settled that failure to object to inadmissible testimony constitutes deficient performance. See e.g., State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987) aff'd, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (lack of timely objection to admission of child hearsay statements constitutes deficient performance); State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1995), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

Because Zielinski bases his ineffective assistance claim on counsel's failure to challenge the admission of evidence, he must also show that an

objection to the evidence likely would have been sustained. Saunders, 91 Wn. App. at 578 (citing McFarland, 127 Wn.2d at 337, n.4).

Witnesses generally must testify only from their personal knowledge of events or circumstances. ER 602. Testimony based on out-of-court statements offered to prove the truth of the matter asserted is inadmissible hearsay. ER 801, 802.

Here, Griffith testified about A.G.'s unsworn, out-of-court statements allegedly made in June 2012, that were offered to prove A.G.'s assertion that she wanted nothing to do with her bed from the Des Moines house, and that she was not yet ready to discuss why. This was hearsay, for which no exception applies. See ER 803 & 804 (setting out exceptions to the hearsay rule under ER 802). Even the trial prosecutor recognized this when she did not attempt to contest defense counsel's subsequent hearsay objection to the same testimony a little while after the first time. RP 272.

There was no possible reasonable strategic basis for Zielinski's counsel not to object to Griffith's hearsay testimony. To the contrary, the record shows defense counsel specifically did not want that evidence in as shown by the hearsay objection the second time it was elicited from Griffith by the prosecutor. Griffith's earlier, un-objected to statement was inadmissible hearsay that would have been excluded with a timely objection

by counsel. RP 270. Therefore, Zielinski's trial counsel's performance was deficient.

Counsel's deficient performance prejudiced Zielinski. As the parties acknowledge in closing remarks, the outcome would turn on the jury's assessment of A.G.'s credibility. Therefore, any evidence tending to corroborate A.G.'s version of events increased the likelihood of a conviction and decreased the likelihood of an acquittal or hung jury. See State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) (corroboration increases credibility) (overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)). Here, although Griffith's hearsay testimony was stricken the second time it was offered (RP 272), the same was not true for the first offer (RP 270), and therefore it remained evidence admitted for the jury's consideration. See State v. Swan, 114 Wn. 2d 613, 659, 790 P.2d 610 (1990), as clarified on denial of reconsideration (June 22, 1990) (absent a motion to strike, successfully objected to evidence remains in the record for consideration by the fact-finder).

The failure to object and to move to strike Griffith's offending hearsay testimony undermines confidence in the outcome and requires reversal under the Strickland standard. 466 U.S. at 685-87. There is a reasonable probability that had defense counsel properly objected and moved to strike the testimony, the trial court would have sustained the

objection and granted the request to strike, and as such, the outcome would likely have been different. A jury that was properly precluded from considering Griffith's hearsay testimony may have found the prosecution failed to meet its burden to prove Zielinski guilty beyond a reasonable doubt because there was insufficient corroborated evidence to find A.G. credible.

In addition, the offending testimony struck a direct blow to the defense theory, which was that had Zielinski really been doing to A.G. what A.G. claimed, she would have reported much earlier. The hearsay testimony that in 2012 A.G. wanted nothing to do with her old bed and did not want to talk about why, cut against the defense theory of fabrication, and supported the prosecution theory that she was too traumatized to act any sooner. Therefore, Zielinski's judgment and sentence should be reversed and the matter remanded for a new, fair trial.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Zielinski to be "unable by reason of poverty to pay for any of the expense of appellate review" and therefore he was entitled to appointment of appellate counsel and production of an appellate record at public expense. Supp. CP __ (Sub. No. 180, Order Authorizing Appeal In Forma Pauperis, Appointment of Counsel and Preparation of Record, filed May 19, 2015). If Zielinski does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the

“court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Bryant's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees, including court costs and fees for a court-appointed attorney. CP 230.

Without a basis to determine that Zielinski has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

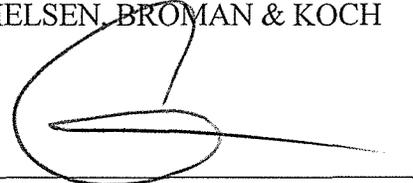
D. CONCLUSION

Defense counsel's failure to object to otherwise inadmissible hearsay testimony constituted deficient performance that prejudiced Zielinski. Therefore, reversal and remand for a new, fair trial is required.

DATED this 9th day of March 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73517-9-I
)	
MICHAEL ZIELINSKI,)	
)	
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 9TH DAY OF MARCH 2016, 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] MICHAEL ZIELINSKI
DOC NO. 382097
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF MARCH 2016.

X *Patrick Mayovsky*