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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of: LEROY F. SALSBERY, Petitioner.	No. 54036-3-II UNPUBLISHED OPINION

LEE, C.J. — Leroy F. Salsbery petitions for relief from personal restraint imposed following his convictions for two counts of first degree rape of a child and two counts of first degree child molestation. Salsbery contends he was denied his right to testify because his decision to not testify was not made knowingly, intelligently, and voluntarily. We deny his personal restraint petition (PRP).

FACTS[1]

In July 2013, GM[2] accused Salsbery, a family friend, of molesting and raping her. At the time, Salsbery was 65 years old and GM was 9 years old. The incidents occurred when GM would stay the night at the home of Salsbery and his girlfriend, Sharon Babcock.

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[1] To allow for full review of this matter, we hereby transfer the electronic record from Salsbery's direct appeal, *State v. Salsbery*, No. 48843-4–II, (Wash. Ct. App. June 19, 2018) (unpublished) http://www.courts.wa.gov/opinions/pdf/D2%2048843-4-II%20Unpublished%20Opinion.pdf, *review denied*, 191 Wn.2d 1022 (2018).

[2] We use initials instead of names for victims of sex crimes to protect their privacy. Gen. Order 2011-1 of Division II, In re Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases (Wash. Ct. App Aug. 23, 2011).

GM reported the touching to her grandmother, Arlene Howard; her aunt, Darcy McFarland; and her godmother, Elizabeth Sledge. GM detailed that Salsbery touched her vagina multiple times and that it hurt her because Salsbery stuck his "whole finger in." 7 Verbatim Report of Proceedings (VRP) (Feb. 23, 2016) at 785. GM also reported the incidents to police. Detective Thad Eakins videotaped his interview of GM, in which she described Salsbery's sexual abuse. GM also reported the abuse to Kathy Butler, a physician's assistant at a child abuse assessment center, and Amy Morris, a licensed mental health counselor with training in children and sexual abuse trauma.

The State charged Salsbery with two counts of first degree rape of a child, or in the alternative first degree child molestation; and two counts of first degree child molestation.

The trial court held a pretrial hearing on the admissibility of GM's statements to Howard, McFarland, Sledge, Eakins, Butler, and Morris. In its unchallenged findings of fact, the trial court found that GM was credible and told many of the State's witnesses substantially the same account spontaneously in response to non-leading questions. Howard, McFarland, Sledge, Eakins, Butler, and Morris all testified to GM's statements during Salsbery's trial.

In addition to Howard, McFarland, Sledge, Eakins, Butler, and Morris, GM testified during Salsbery's trial. GM told the jury she was in court because Salsbery did "something bad to [her]." 7 VRP (Feb. 23, 2016) at 713. She provided details of Salsbery kissing her, touching her on her "private spot" or "outside" where she went pee, and pulling her inside the shower and making her wash him. 7 VRP (Feb. 23, 2016) at 714, 716. GM testified that she went into Salsbery's bedroom with him, where he pulled down her pants and underwear and rubbed the outside of her vagina. In one incident, Salsbery put GM's hand inside his shorts and made her rub his penis. GM then

testified "[Salsbery] told me to never tell [about the abuse] or he would kill me." 7 VRP (Feb. 23, 2016) at 726.

On cross examination, defense counsel asked GM the number of times Salsbery touched her vagina, and GM said "10" times, and then later said "five" times. 7 VRP (Feb. 23, 2016) at 742, 754. He also asked GM the number of times Salsbery kissed her, and she said one time.

After the State rested, the trial court informed Salsbery, "[Y]ou have the right to testify. You also have the right not to testify. So you mull it around with your attorney and decide whether or not you wish to take the stand." 13 VRP (Feb. 29, 2016) at 1594.

Salsbery's defense was that GM was not credible. In support, Salsbery called expert witnesses to testify that GM suffered from reactive attachment disorder from not having her needs met by her mother.

Before the defense rested, the trial court informed Salsbery that once the defense rests, he will not be able to testify. Salsbery informed the court that he understood. The trial court then asked Salsbery if it was his desire to not testify. Salsbery responded, "Yes." 14 VRP (Feb. 29, 2016) at 1748. The trial court instructed the jury, "[Salsbery] is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way." Clerk's Papers (CP) at 258.

The jury found Salsbery guilty of two counts of first degree rape of a child and two counts of first degree child molestation. Salsbery appealed, and this court affirmed in an unpublished opinion.[3] The matter mandated on November 27, 2018.[4]

[3] *Salsbery*, No. 48843-4–II, slip op.

[4] *Mandate*, No. 48843-4-II (November 27, 2018).

Salsbery then filed this timely PRP. In support of his PRP, Salsbery provided declarations from himself and Babcock.

In his declaration, Salsbery states that his defense counsel "insisted that I not testify, that I was too folksy. . . . Because of my inability to recall exact dates, [defense counsel] was worried I would not be believable to the jury and that I was trying to hide something." Br. of Petitioner at Exh. A at 1. Salsbery also states that defense counsel brought in another attorney to do a mock trial, and defense counsel believed Salsbery "would elaborate too much on the stand." Br. of Petitioner at Exh. A at 2. The attorney doing the mock trial on Salsbery "indicated [that] he lost when he put his client, the defendant, on the stand," which bolstered defense counsel's belief that Salsbery should not testify. Br. of Petitioner at Exh. A at 2. Salsbery further states that "[a]lthough [defense counsel] advised me that I should not testify . . . . I wanted to testify in my case . . . [h]owever, I was afraid that my attorney would quit on me so I said I did not want to testify based upon [defense counsel's] recommendation." Br. of Petitioner at Exh. A at 2.

In her declaration, Babcock confirms that defense counsel "arranged to have a colleague of [defense counsel] interview [Salsbery] in a mock trial" and that Salsbery learned from defense counsel's colleague that he "had lost the case when his client chose to testify in a similar case." Br. of Petitioner at Exh. B a 1, 2. Babcock also confirms that Salsbery "struggled with the decision on whether to testify" and that Salsbery "listened to [defense counsel's] advice." Br. of Petitioner at Exh. B at 2. Babcock states that she heard defense counsel advise Salsbery "several times" that he shouldn't testify at trial and that she believed defense counsel coerced Salsber] to not testify.

ANALYSIS

Salsbery contends that he was denied his right to testify because defense counsel coerced him into not testifying. We disagree.

A. PRP STANDARD OF REVIEW

Relief via a collateral challenge to a conviction is an "'extraordinary'" remedy, and a petitioner bringing a PRP "'must meet a high standard before [we] will disturb an otherwise [final] judgment.'" *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 301 P.3d 450 (2013) (quoting *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011)). To be entitled to relief in a PRP, the petitioner must establish either a constitutional error that resulted in actual and substantial prejudice or a nonconstitutional error that amounts to a fundamental defect resulting in a complete miscarriage of justice. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17-18, 296 P.3d 872 (2013). The petitioner must state with particularity the factual allegations underlying his or her claim of unlawful restraint. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Bare assertions and conclusory allegations are not sufficient. *Id*. at 886.

The petitioner must also provide evidentiary support for his or her allegations. RAP 16.7(a)(2). If the trial court record does not support the factual allegations, then the petitioner must show through affidavits or other forms of corroboration that competent and admissible evidence will establish the factual allegations. *Rice*, 118 Wn.2d at 886. The petitioner may not rely on mere speculation, conjecture, or inadmissible hearsay. *Id*.

If the petitioner fails to make a prima facie showing of either actual and substantial prejudice or a fundamental defect, we deny the PRP. *Yates*, 177 Wn.2d at 17-18; *In re Pers. Restraint of Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015). If the petitioner makes such

a showing, but the record is not sufficient to determine the merits, we remand for a reference hearing. *Yates*, 177 Wn.2d at 17-18. If, however, we are convinced the petitioner has proven actual and substantial prejudice or a fundamental defect, we grant the petition. *Id.*

B. RIGHT TO TESTIFY

A defendant has a fundamental right to testify on his or her own behalf. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). A defendant may waive the right to testify. *State v. Lee*, 12 Wn. App. 2d 378, 387, 460 P.3d 701, *review denied*, 195 Wn.2d 1032 (2020). The waiver must be made knowingly, voluntarily, and intelligently. *Id.* "'[A] trial judge is not required to advise a defendant of the right to testify in order for a waiver of the right to be valid.'" *Id.* at 388 (quoting *State v. Thomas*, 128 Wn.2d 553, 557, 910 P.2d 475 (1996)). "[A] judge 'may assume a knowing waiver of the right from the defendant's conduct. The conduct of not taking the stand may be interpreted as a valid waiver of the right to testify.'" *Id.* (quoting *Thomas*, 128 Wn.2d at 559).

In claiming a waiver was not knowingly and voluntarily made, a defendant must show the attorney actually prevented him from testifying. *Robinson*, 138 Wn.2d at 759. "Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify." *Id.* at 760. Instead, a defendant must present specific factual evidence. *Id.*

Defendants can show that their attorneys prevented them from testifying if the attorneys used coercion or made misrepresentations to induce the defendant to remain silent. *Id.* at 762. In addition, a defendant can show that their attorney refused to call them as witnesses even though they wanted to testify. *Id.* at 762-63. The court in *Robinson* stated,

> [I]n order to prove that an attorney actually prevented the defendant from testifying, the defendant must prove that the attorney refused to allow him to testify in the face of the defendant's unequivocal demands that he be allowed to do so. In the absence of such demands by the defendant, however, we will presume that the defendant elected not to take the stand upon the advice of counsel.

Id. at 764.

C. PETITIONER DOES NOT MEET HIS BURDEN

Here, after the State rested its case in chief, the trial court advised Salsbery of his right to testify and advised him to "mull it around with your attorney and decide whether or not you wish to take the stand." 13 VRP (Feb. 29, 2016) at 1594. Before the defense rested, Salsbery informed the trial court that he understood he had the right to testify but decided to not testify.

The trial court record does not support Salsbery's allegation that he was coerced to not testify. If the trial court record does not support a petitioner's factual allegation, then the petitioner must show through affidavits or other forms of corroboration that competent and admissible evidence will establish the factual allegations. *Rice*, 118 Wn.2d at 886.

Salsbery supports his allegation that he was coerced to testify through his and Babcock's declarations. But these declarations do not establish that defense counsel prevented Salsbery's testimony. Rather, they show that defense counsel took Salsbery's desire to testify seriously and that counsel fully advised Salsbery of counsel's concerns. Both declarations show only that counsel gave advice; it does not say counsel dictated the decision or prevented Salsbery from testifying. While Salsbery said that he was afraid his counsel would quit if he chose to testify, neither declaration asserts that Salsbery's attorney ever threatened to terminate representation. Moreover, neither declaration states that Salsbery demanded that he be allowed to testify or that Salsbery even told his counsel that he wanted to testify. *See Robinson*, 138 Wn.2d at 760 (mere allegations that counsel prevented the defendant from testifying are insufficient). Accordingly,

Salsbery's allegation that his decision to not testify was involuntary is not supported by the declarations. *Rice*, 118 Wn.2d at 886.

Moreover, Salsbery cannot show a constitutional error that resulted in actual and substantial prejudice. *Yates*, 177 Wn.2d at 18. Not only did GM testify to the incidents, Howard, McFarland, Sledge, Eakins, Butler, and Morris all testified about GM's statements. Defense counsel was able to cross examine the witnesses and argue Salsbery's theory that GM was lying. And the trial court instructed the jury, "[Salsbery] is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way." CP at 258. Because Salsbery fails to make a prima facie showing of actual and substantial prejudice, his challenge fails.

We deny the PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, C.J.

Lee, C.J.

We concur:

Maxa, J.

Glasgow, J.