IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of: ROBERT MARK DOBYNS Petitioner.	No. 42366-9-II UNPUBLISHED OPINION

Penoyar, J. — In a personal restraint petition (PRP), Robert Dobyns argues that he received ineffective assistance of counsel when defense counsel (1) failed to investigate whether pornographic images were viewed on the computer he used when he lived with the victim and her mother, (2) did not consult with computer or medical experts, (3) failed to admit recordings into evidence, and (4) conducted cross-examination of a police detective. He also alleges his convictions should be reversed under the cumulative error doctrine. Defense counsel's conduct can be characterized as legitimate trial strategy, and Dobyns fails to prove that he was prejudiced by any of counsel's conduct. We deny Dobyns's PRP.

FACTS

Robert Dobyns moved in with NM's mother and NM when NM was nine years old. *State v. Dobyns*, noted at 156 Wn. App. 1026, 2010 WL 2265447, at *1. Dobyns moved out in December 2002 after his romantic relationship with NM's mother ended. *Dobyns*, 2010 WL 2265447, at *1.

In February 2006, NM told her mother that Dobyns sexually abused her when he lived with them. *Dobyns*, 2010 WL 2265447, at *1. NM's mother reported the abuse to the police.

Dobyns, 2010 WL 2265447, at *1. NM told the police that after Dobyns moved in, he fondled her while viewing pornography on the computer. *Dobyns*, 2010 WL 2265447, at *1. She also told police that Dobyns called her into his room at night while her mother, who worked the night shift as a nurse, worked. *Dobyns*, 2010 WL 2265447, at *1. He would ask her to "snuggle" and would then engage in oral sex with her and digitally penetrate her. *Dobyns*, 2010 WL 2265447, at *1. NM reported that this happened nearly every night that her mother was at work. *Dobyns*, 2010 WL 2265447, at *1.

Police detectives devised a plan to have NM confront Dobyns on the telephone. *Dobyns*, 2010 WL 2265447, at *1. A police detective applied to the court for authorization to intercept and record the conversation. *Dobyns*, 2010 WL 2265447, at *1. The court issued an order authorizing the interception and recording of conversations between the two relating to the commission of the crimes of first degree child rape and first degree child molestation. *Dobyns*, 2010 WL 2265447, at *1.

NM made two calls to Dobyns and police recorded the conversations. *Dobyns*, 2010 WL 2265447, at *1. In the first conversation, NM told Dobyns that she needed to talk to him because there had been a discussion about sex at school and she was confused. *Dobyns*, 2010 WL 2265447, at *1. She asked Dobyns whether she was still a virgin and whether what they had done was wrong or right. *Dobyns*, 2010 WL 2265447, at *1. She also said she was thinking she should tell someone but did not know whether she should. *Dobyns*, 2010 WL 2265447, at *1. Dobyns asked NM what she was going to tell. *Dobyns*, 2010 WL 2265447, at *1. She responded that he kissed her, touched her, took her clothes off, digitally penetrated her, and engaged in oral sex with her. *Dobyns*, 2010 WL 2265447, at *1. He initially denied digital

penetration but ultimately admitted to it. *Dobyns*, 2010 WL 2265447, at *1. He also admitted that they had "slept together." *Dobyns*, 2010 WL 2265447, at *1. Dobyns told NM that he was not in a place where he could talk but that she should call him at work the next day. *Dobyns*, 2010 WL 2265447, at *1.

The next day, NM called Dobyns at work. *Dobyns*, 2010 WL 2265447, at *1. She again told him that she was confused and wanted to know whether she was still a virgin and whether what they had done was wrong. *Dobyns*, 2010 WL 2265447, at *1. He told NM that he would imagine she was still a virgin but that "what we did was wrong on my part." *Dobyns*, 2010 WL 2265447, at *1. He also said he did not feel comfortable talking on the phone because it could be misconstrued. *Dobyns*, 2010 WL 2265447, at *1. NM stated that she needed to talk; he agreed that they needed to talk but told NM that if she talked to anyone else, there would be "consequences, . . . consequences for me but neither one of our lives will [be] the same after that," and that he would be "going to jail." *Dobyns*, 2010 WL 2265447, at *1.

The State charged Dobyns with three counts of first degree child rape, two counts of first degree child molestation, and five counts of second degree child rape and alleged aggravating factors in support of an exceptional sentence. *Dobyns*, 2010 WL 2265447, at *2. At trial, the jury heard the taped conversations. Dobyns testified that during the recorded conversations with NM, he knew "she was talking about something sexual but [he] couldn't understand why it was pertaining to [him]." 3 Report of Proceedings (RP) at 598. He testified that he believed the conversation was, in part, about "having slept in the same bed as her and [her mother] a couple times." 3 RP at 602. The jury found Dobyns guilty as charged and found by special verdict that the aggravating factors had been established. *Dobyns*, 2010 WL 2265447, at *2.

ANALYSIS

I. Ineffective Assistance of Counsel

Dobyns argues that his convictions should be reversed due to ineffective assistance of counsel. He claims that counsel was ineffective when it failed to investigate whether pornographic images were viewed on the computer Dobyns used when he lived with NM and her mother, failed to consult with experts, failed to admit the recordings into evidence, and when it cross-examined Detective Carl Buster. Dobyns fails to prove that counsel was ineffective or that he was prejudiced by defense counsel's conduct.

A. Standard of Review

A petitioner may request relief from an unlawful restraint through a PRP. RAP 16.4. To prevail on a PRP, the petitioner must show that there was a constitutional error that resulted in actual and substantial prejudice to the petitioner or that there was a nonconstitutional error that resulted in a fundamental defect which inherently results in a complete miscarriage of justice. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). To prevail on a PRP alleging constitutional error, the petitioner must prove the error was prejudicial by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

A criminal defendant has the right to assistance of counsel under the Sixth Amendment to the United States Constitution. *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). This right to assistance of counsel is the right to effective assistance of counsel. *Crawford*, 159 Wn.2d at 97. A successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance fell below an objective standard of reasonableness and that the

defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

There is a strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). If counsel's conduct "'can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863). "This presumption can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial." *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "[I]f a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice." *Crace*, 174 Wn.2d at 846-47. A petitioner's failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

B. Failure to Investigate

First, Dobyns contends that defense counsel failed to provide effective assistance when counsel appeared to be unaware that at one point NM told the police about pornography on Dobyns's computer and that counsel failed to investigate this possibility. Dobyns fails to

demonstrate that counsel's performance fell below an objective standard of reasonableness.

"[A] particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments." *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). At a minimum, a defendant seeking relief under a "failure to investigate" theory must show a reasonable likelihood that the investigation would have produced useful information not already known to the defendant's counsel. *See, e.g.*, *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (noting that an ineffective assistance claim fails when the record clearly shows that the lawyer was well-informed, and the defendant fails to state what additional information would be gained by discovery she or he now claims was necessary.), *amended by* 253 F.3d 1150 (2001).

At trial, NM testified on direct examination that Dobyns touched her for the first time in the computer room. NM had come home from swimming and was looking at the computer with Dobyns. NM testified that, after that incident, Dobyns touched her inappropriately in the computer room on a weekly basis and that when she was looking at the computer with Dobyns, "pornographic images" would appear on the screen in "pop-ups." 2 RP at 215.

Outside the presence of the jury, defense counsel objected to the State's line of questioning, "I've never been supplied with anything about a computer. As part of their discovery the police officer found out where this computer was, to my knowledge never went and got it, never checked it. I received nothing." 2 RP at 215-16. Counsel moved for a mistrial "because the jury's already heard this and that puts him in the position of being like a child porn person." 2 RP at 216. The State responded that the police reports indicated that NM had previously stated that there "were some pornographic images that came up and the defendant made some comments

about them." 2 RP at 216. The parties then examined the police report; the State noted that in the report, NM denied that Dobyns looked at "pornographic sites per se" but indicated that there were pornographic images that "would pop up and [Dobyns] would comment about it." 2 RP at 217, 219. The State conceded, "you're right, she never said he went to any specific sites to look at it." 2 RP at 217. Defense counsel stated, "I don't care what's in the police report. . . . They took a 36 to 40-page statement from this young lady. . . . In that statement they discussed this. She said no porn." 2 RP at 219. The trial court denied defense counsel's motion for mistrial, concluding that the information had been disclosed as part of discovery.

Defense counsel interviewed NM "more than once" and had thorough knowledge of her taped statement to the police. 2 RP at 308. And the record does not reflect that defense counsel was unaware of the content of the police reports; rather, it appears that he was hoping to limit the evidence presented to the jury of NM's taped statement by arguing that he had not received adequate discovery regarding the computer. Further, there is no indication from this record that pornographic images would not have been discovered on the computer, evidence that would have placed Dobyns in a very unfavorable light before the jury. Even if defense counsel's conduct constituted deficient performance, Dobyns was not prejudiced by defense counsel's failure to investigate the computer issue. During cross-examination, defense counsel attacked NM's credibility by asking her about her taped statements to the police and whether she ever told her mother about the images on the computer. Defense counsel's strategy made sense: try to keep the earlier statements out, and if they come in, use them to attack NM's credibility. Dobyns's claim of ineffective assistance fails.

C. Failure to Consult with Experts

Next, Dobyns argues that he received ineffective assistance of counsel when defense counsel failed to consult computer and medical experts. Again, because Dobyns fails to prove that he was prejudiced by defense counsel's conduct and because counsel's decision to call a witness is a matter of trial strategy, these claims fail.

Generally, an attorney's decision to call a witness to testify is "a matter of legitimate trial tactics," which "will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). A petitioner can overcome this presumption by demonstrating that counsel failed to adequately investigate or prepare for trial. *Byrd*, 30 Wn. App. at 799 (quoting *Jury*, 19 Wn. App. at 263).

First, Dobyns argues that defense counsel should have located the computer and conducted "defense tests on it to disprove [the] allegations [that Dobyns viewed pornographic images on the computer with NM]." Br. of Pet'r at 8. As discussed above, defense counsel effectively tried to disprove those allegations through his cross-examination of NM. Further, Dobyns fails to show that he was prejudiced by the lack of expert testimony regarding whether pornographic images were on the computer. At trial, Detective Buster testified that, based on what he learned during his investigation, he did not believe he would be able to obtain anything of evidentiary value from the computer.

Next, Dobyns argues that counsel should have obtained an expert witness to offer testimony on the effects of Dobyns's medication, Wellbutrin. Again, Dobyns's argument fails for lack of prejudice. At trial, defense counsel moved for a continuance to allow him to obtain a medical expert to testify on the effects of Dobyns's medication. The trial court denied his motion.

First, counsel timely corrected his mistake when he moved for a continuance to obtain a medical expert. Second, Dobyns was not prejudiced by defense counsel's conduct. Defense counsel ultimately elicited testimony from Dobyns on the effects of the Wellbutrin: Dobyns testified that the medication made him feel "tired" and stopped him from having the urge to be sexual. 3 RP at 523. Dobyns acknowledges this but contends that "the testimony of an expert would have been far preferable." Br. of Pet'r at 9. Although this may be true, Dobyns fails to demonstrate how the result of the proceeding would have been different if the jury had heard the testimony from a different witness.

Finally, Dobyns contends that counsel had a duty "to be proactive in the investigation of the defense case" and, thus, should have consulted with "a defense expert as to the likelihood of finding evidence of trauma where claims such as these are being made" or should have "request[ed] an examination of the alleged victim by a defense expert." Br. of Pet'r at 9-10. Dobyns cites to defense counsel's closing argument:

> But going through those facts is important. Medical evidence, a colposcope, did she have any trauma, did she have any history of any trauma? They didn't bring it to you. That's their job. I want you to understand it's not my job to bring you anything, nothing. It's their job to convict. Doesn't mean I have to disprove everything they say. It's not my job. It's their job to bring it forward. It's their witnesses. They can give them consents.

Br. of Pet'r at 9 (citing 3 RP at 689). Defense counsel's closing argument does not reveal that defense counsel failed to investigate Dobyns's case. To the contrary, defense counsel exercised a legitimate trial strategy during closing argument by pointing out the lack of corroborating evidence to support the convictions. Further, an attorney's decision to call a witness is a matter of legitimate trial tactics. Dobyns makes the bare assertion that it would have been "more

powerful" for an "expert to testify that the number of and type [of] alleged sexual assaults allegedly committed upon [NM] by the Petitioner would have left some degree of physical evidence" but fails to demonstrate how defense counsel's failure to call an expert medical witness was due to counsel's lack of preparation for trial. Br. of Pet'r at 4.

D. Failure to Admit Recordings into Evidence

Next, Dobyns argues that he received ineffective assistance of counsel when counsel failed to ensure that the tapes of the conversations between NM and Dobyns were admitted as evidence. The State "reluctantly agrees that failing to admit the tape recordings into evidence was obviously not a tactical decision by Dobyns's trial counsel." Br. of Resp't at 13. Dobyns's claim fails, however, because he fails to demonstrate that he was prejudiced by defense counsel's conduct.

During closing argument, defense counsel repeatedly urged the jury to listen to the recordings during deliberations. First, defense counsel argued:

> You get to take the tape back with you and if you want to play it and listen to it. Now, he can argue all he wants about how he had all kinds of time to think about things, to visualize the answers, to do all that. Not on this tape. I mean, you will be able to see if his testimony is consistent that she was rushing him, asking him questions and he was trying to answer. It's pretty obvious when you listen to it. You'll get to listen to it. He's stammering and stuttering. That's not necessarily because he's guilty about something. He can't get an answer in. So I want you to pay attention to that, if you would.

3 RP at 684. Defense counsel also asked the jury to listen to the recordings to determine whether Dobyns answered NM's questions, "And that's where I want you to listen to the tape. I took your clothes off? I want you to listen to the tape because those are questions. Those aren't answers. . . . And I don't care how the State tries to make you believe it. You can listen." 3 RP at 693. Defense counsel also asked the jury to listen to the tape to notice whether Dobyns was

rushed to answer NM's questions:

> Listen to the tape. I've listened to it. . . . Listen to whether or not he had time to answer things, whether he was getting pushed, rushed, whether he was stammering, whether he was trying to say no, no, no, no, no, [NM], no, no. Listen to it. Just because you may not have responded that way doesn't mean he didn't.

3 RP at 704-05. After closing argument, however, defense counsel noticed that the tapes had not been admitted as evidence. Thus, he moved for their admission. The trial court denied defense counsel's motion, "[T]hey weren't offered and they weren't admitted so they are not going." 3 RP at 721.

We fail to see why the late motion to admit was not granted. Thus, it appears defense counsel corrected his mistake in a timely manner. In any case, Dobyns fails to prove that he was prejudiced by defense counsel's deficient performance. Contrary to Dobyns's assertion, the jury was not "deprived" of "critical evidence:" the recordings were played for the jury at trial. Reply Br. of Pet'r at 5. The jury was also provided with a transcript to read while the recording played. It is hard to see how having the quite damaging tapes to listen to again could have made the jury more sympathetic to Dobyns's arguments. Dobyns fails to prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

E. Cross-Examination of Detective Buster

Finally, Dobyns argues that "the most egregious example of ineffective assistance of counsel" occurred when counsel cross-examined Buster. Br. of Pet'r at 14. Dobyns contends that counsel's questions "gave the jury the opinion of Detective Buster that [NM] was telling the truth, and that Defendant Dobyns was lying and was guilty." Br. of Pet'r at 17. Because

counsel's cross-examination of Buster constituted a legitimate trial strategy, we disagree.

Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 720, 101 P.3d 1 (2004). During cross-examination, defense counsel asked Buster whether he had "personal knowledge" of what had occurred. 2 RP at 462. He then asked Buster a series of questions regarding whether he had a "gut feeling" about what had occurred. 2 RP at 465-66. The cross-examination, when read as a whole, however, reveals that defense counsel's cross-examination of Buster was meant to establish that the detective had no personal knowledge of what had actually occurred. Counsel asked Buster whether he was at NM's home when she was with Dobyns, whether he had met NM or her mother before March 2006, and whether "[his] investigation told [him] anything that we haven't heard." 2 RP at 466. We conclude that counsel's cross-examination technique was a matter of trial strategy and did not constitute deficient performance.

II. Cumulative Error Doctrine

Finally, Dobyns contends that we should reverse his convictions under the cumulative error doctrine. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless, when the errors combined denied the defendant a fair trial. *State v. Weber,* 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Greiff,* 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *State v. Yarbrough,* 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). The errors combined did not deny Dobyns a fair trial. Dobyns's claim fails.

We deny Dobyns's 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.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Worswick, C.J.