FILED

JAN. 31, 2012

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29250-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
MIGUEL RAFAEL ZEPEDA MANCILLA, JR.,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Miguel Zepeda Mancilla appeals his four child rape convictions, arguing that his counsel was ineffective and the trial court erred in declining to consider his request for an exceptional sentence. We affirm.

FACTS

A jury concluded that Mr. Zepeda Mancilla, then age 20, engaged in sexual intercourse with 13-year-old G.B. four times over a five week period. Prior to trial the prosecutor moved in limine to exclude evidence that G.B. was a runaway, had gang connections, had criminal convictions, had mental health problems, used drugs, and was

in a rehabilitation center. Defense counsel agreed that there was no basis for inquiring about the first four matters. He also told the court that he did not see a basis for inquiry about the drug usage and treatment unless G.B.'s testimony raised the issue. The trial court directed counsel to approach at sidebar if there was reason to believe there should be inquiry on those topics. Report of Proceedings (RP) at 168.[1]

G.B. testified that she told Mr. Zepeda Mancilla she was 15; this occurred between the second and third occasions on which the couple engaged in intercourse. Mr. Zepeda Mancilla testified that she had told him she was 18. He denied engaging in intercourse with her on the first occasion that she identified, but agreed that they had done so on the other three occasions.

The prosecutor had charged four counts of second degree child rape. On the basis of G.B.'s testimony, the defense sought instructions on the inferior degree offense of third degree rape. The trial court permitted the inferior degree instruction on counts three and four.

The jury sent a written inquiry to the court asking why there were no lesser offenses for counts one and two. The trial court did not provide a substantive answer to the question. The jury subsequently concluded that Mr. Zepeda Mancilla was guilty of

[1] RP denotes the consecutively paginated transcript of the trial proceedings. The sentencing hearing was July 26, 2010.

two counts of second degree child rape and two counts of third degree child rape.

The defense sought an exceptional sentence on the basis that G.B. was a willing participant in the offenses. After noting the State's argument that she could not be a willing participant because she lacked ability to consent, the court concluded that it did not find the *Clemens*[2] case persuasive. RP (July 26, 2010) at 18. The court concluded that there were no compelling reasons to declare an exceptional sentence. RP (July 26, 2010) at 19.

The trial court imposed concurrent low-end standard range sentences. Mr. Zepeda Mancilla then appealed to this court.

ANALYSIS

This appeal presents two challenges. Mr. Zepeda Mancilla first challenges his counsel's effectiveness during trial. He also takes issue with the court's decision to impose a standard range sentence. We will address each issue in turn.

Counsel's Performance

Mr. Zepeda Mancilla contends that his counsel failed him in two respects. First, counsel did not pursue the issue of G.B.'s drug usage and rehabilitation stay. He also contends that counsel did not argue for an inferior degree offense of third degree child

[2] *State v. Clemens*, 78 Wn. App. 458, 898 P.2d 324 (1995).

rape on counts one and two. The record does not establish any error by counsel.

Well-settled standards apply to our review of this issue. The Sixth Amendment guarantees the right to counsel. The attorney must perform to the standards of the profession. Effectiveness of counsel is judged by the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. A strategic or tactical decision is not a basis for finding error. *Id*. at 689-691. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

The first contention that counsel erred involves the acknowledgement that there was no basis for questioning G.B. about drug usage and rehabilitation. Evidence of drug usage is admissible at trial if there is a basis for believing the witness was under the influence "either at the time of the events in question, or at the time of testifying at trial." *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). Usage on other occasions is not admissible. *Id*. at 344-345.

Here, there was no evidence in the record that G.B. was under the influence at the time she testified. There likewise was no evidence that she was under the influence at the time she engaged in intercourse with the defendant or when she told him that she was 15. On this record, there is no basis for concluding that trial counsel erred at all.[3] The first argument does not support a determination that counsel failed to provide adequate representation.

The other alleged failure of counsel involves the inferior degree offenses. By statute, either party in a criminal case is entitled to an instruction on an inferior degree offense in appropriate circumstances. RCW 10.61.003. In order to instruct on an inferior degree offense, there must be a factual basis for believing that only the inferior crime was committed. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). RCW 9A.44.030(2) provides an affirmative defense that the defendant reasonably believed the child was of age based on her declarations of age.[4] Here, if the defendant persuaded the jury that he reasonably believed G.B. was 15, he would be guilty of third degree child rape instead of second degree child rape.

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[3] Typically, the remedy when the record does not support an argument is for the defendant to bring a personal restraint petition and provide evidence to support the argument. *E.g.*, *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159, *review denied*, 117 Wn.2d 1018 (1991).

[4] The relevant ages vary by the degree of the offense. RCW 9A.44.040(3).

The prosecutor sought inferior degree instructions on counts 2 through 4. RP at 309-310. Defense counsel apparently sought an inferior degree instruction on all four counts. RP at 310. The trial court correctly concluded that the evidence only supported an inferior degree instruction on the final two counts because the record established that G.B. told Mr. Zepeda Mancilla that she was 15 on November 29, 2009, a date after the charging dates for the first two counts. RP at 261, 311. While there was reference to her making the same statement on another occasion, the record does not establish when that took place. Defense counsel told the court that he thought it was confusing to the jury to instruct on the inferior degree offenses only on the last two counts and, therefore "I like it." RP at 313. Accordingly, defense counsel had no objection to any of the instructions. RP at 317.

Because the record supported giving the inferior degree instructions only on counts three and four, there is no basis for finding that counsel erred with regard to the jury instructions.[5] Defendant has failed to establish the first *Strickland* prong—that his counsel erred—on either of his theories of ineffectiveness. Therefore, we need not discuss whether there was any prejudice established. *Foster*, 140 Wn. App. at 273.

Defendant failed to establish that his attorney provided inadequate representation

[5] We thus need not reach the apparently tactical decision to not object to the decision to not instruct on an inferior degree offense for the first two counts.

at trial.

Sentencing

Defendant's other contention is that the trial court erred at sentencing by not considering his request for an exceptional sentence. Because the trial court did consider the argument, there is no basis for challenging this standard range sentence.

The general rule is that a standard range sentence cannot be appealed. RCW 9.94A.585(1). Accordingly, when the trial court declines to impose an exceptional sentence, the only available method of attacking that decision is to establish that the trial court failed to do something it was required to do at sentencing. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). A defendant may also challenge the trial court's usage of an impermissible basis for refusing an exceptional sentence. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329-330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998).

Recognizing these limitations on his appeal, Mr. Zepeda Mancilla contends that the trial court declined to impose an exceptional sentence because he took the case to trial and on the basis that the mitigating factor of willing participation did not apply to child sex offenses. The record does not support either argument.

First, the trial court expressly stated that it was not "factoring . . . in" the defendant's decision to go to trial at sentencing. RP (July 26, 2010) at 17. The statement

was made in the context of explaining the huge risk defendants took in taking these cases to trial and that because the State also had factors to consider, the vast majority of the cases were resolved by plea bargain. *Id.* The court noted that for whatever reason, no agreement had been reached in this case. *Id*. It is very clear that the trial court was simply explaining how the case had reached the position it was in. The trial court was not punishing the defendant for taking the case to trial.

The record likewise establishes that the trial court considered the defendant's request for a mitigated sentence on the basis that G.B. was a willing participant in the offenses. Both parties had briefed the issue, with the defendant arguing that G.B. was the initiator and the State contending that someone her age could never be considered a willing participant. Clerk's Papers at 124-125, 128. The State's briefing had been aimed at distinguishing the decision in *Clemens*, 78 Wn. App. 458, where a divided panel had upheld an exceptional sentence in a third degree child rape case based on the victim's initiation and willing participation in the offense.

The trial court reviewed *Clemens* and concluded that it was not persuasive "based upon the facts presented here." RP (July 26, 2010) at 18. The court noted some of the factual distinctions between the two cases, but it did not decline to *consider* an exceptional sentence. Instead, it simply determined that the exceptional sentence was not

justified in this case.

The trial court did what it was required to do. The court considered Mr. Zepeda Mancilla's request, but declined to grant it. Mr. Zepeda Mancilla has not established that the trial court failed to follow a mandatory sentencing procedure. *Mail*, 121 Wn.2d at 712-713. Accordingly, he has no basis for challenging his standard range sentence. *Id*. at 714.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

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Brown, J.

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Siddoway, J.