

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

STATE OF WASHINGTON,

Respondent,

v.

TODD J. ANDERSON,

Appellant.

No. 37830-2-II

UNPUBLISHED OPINION

Bridgewater, P.J.—Todd Anderson appeals his conviction for first degree child molestation, arguing that the trial court allowed a witness to comment on his silence and that his trial counsel was ineffective when he failed to object to that comment. Concluding that Anderson had waived his right to remain silent and that his counsel was not ineffective, we affirm.¹

Then five-year-old M.H. told her father’s girlfriend, Sara Burkhart, that her mother’s

¹ A commissioner of this court initially considered Anderson’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

boyfriend, Anderson, had been touching her vaginal area. M.H. also told Burkhart that her mother had told her not to tell anyone. Burkhart notified police. On August 9, 2007, Detective Chris Ivanovich interviewed M.H., who repeated her assertions about Anderson's conduct. On August 13, 2007, he contacted Anderson, who agreed to be interviewed. Anderson acknowledged and waived his right to remain silent. He agreed to make a taped statement, in which he said that while tucking M.H. into bed, she might have felt his hand on her vaginal area. He later agreed to be interviewed by Detective Cheryl Stines. On August 17, 2007, Detective Stines interviewed Anderson. Anderson acknowledged and waived his right to remain silent. Anderson denied having touched M.H. in a "sexual manner" and said that he might incidentally touched her vaginal area while moving her. Report of Proceedings (RP) Apr. 16, 2008 at 190. But later in the interview, Anderson said that when he tucked M.H. into bed, he rubbed his thumb back and forth over her vaginal area for a few seconds.

The State charged Anderson with first degree child molestation. After a CrR 3.5 hearing, the trial court found that Anderson's statements to the detectives were admissible. After another hearing, the court found that M.H. was competent to testify. M.H., Barnhart and the detectives testified as described above. In addition, the following colloquy occurred between the prosecutor and Detective Stines:

Q. . . . [A]t this point [in the interview, after Anderson said he had rubbed his thumb over M.H.'s vaginal area], did you want to try to have a taped statement at this point?

A. I asked him if he would be willing to give a taped statement as to the events he just told me about, and he declined.

Q. And what was your thinking as to why you were trying to get this taped statement at this point?

A. Because the statement would be in his words, and I explained that. I explained that I can – when I offer the taped statements, that I can use my notes

and write my report from my notes, or I can take a taped statement, and it would be his words on the statement. At that time – and he was pretty upset, and I think he – well, he declined and just wanted me to write my report from my notes.

RP Apr. 16, 2008 at 194-95.

Anderson testified, denying that he ever intentionally touched M.H. in a sexual manner.

When asked to explain why he had made his statement to Detective Stines, he said:

A. I believed that was the way to make it go away, from what she had previously told me. She said I could get counseling and that it could all go away, I wouldn't lose my family or any of that. That's what I was worried about. I'm like, they're trying to come after me. At this point, I put it together they're coming after me for something, but they're coming after me for something I didn't do, how am I going to make this go away. And the way she proposed it, counseling, it all goes away.

RP Apr. 21, 2008 at 352.

The jury found Anderson guilty of first degree child molestation.

Anderson argues that the colloquy between the prosecutor and Detective Stines, quoted above, was improper testimony about his exercise of his right to remain silent. *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). But unlike the defendant in *Easter*, Anderson acknowledged and waived his right to remain silent before his interview with Detective Stines. And he did not re-invoke his right to remain silent during that interview. He only declined to have his statements recorded. The colloquy did not violate Anderson's right to remain silent.

Anderson also argues that his trial counsel afforded him ineffective assistance when he did not object to the colloquy between the prosecutor and Detective Stines. But, as addressed above, that colloquy was not objectionable. Anderson's counsel's failure to object to it was not deficient performance and so was not ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S.

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668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We affirm Anderson's conviction.

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 pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.