IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64932-9-I
Respondent,	)	DIVISION ONE
v.	)	
JASON CHARLES WELLS,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: June 1, 2010

Spearman, J.-The determination of whether an "all or nothing" strategy is so objectively unreasonable as to constitute ineffective assistance of counsel is a highly fact-specific inquiry. Here, in light of the facts in the record before us, we hold defense counsel's decision not to pursue a lesser included offense instruction was a legitimate trial tactic, and his performance was not deficient. We also reject defendant's claim that counsel's voluntary intoxication instruction was faulty. The defendant's conviction for child molestation in the first degree is affirmed.

FACTS

Daniel and Melissa R. went out for an evening of drinking with friends, one of whom was the defendant, Jason Wells. By the end of the evening, Jason, who had been drinking beer, mixed drinks, and shots, was so intoxicated that he could not drive home, and he left with the couple to stay at their house. According to Melissa, Jason was "falling down drunk," unable to function, and needed assistance to get to the

couple's car. When they arrived at the residence, Daniel passed out on the garage floor. Melissa helped Jason up the stairs to a spare room, which was adjacent to the bedroom of B.R., Daniel and Melissa's five-year-old daughter.

In the morning, Melissa found Jason and B.R. asleep in B.R.'s bed. Jason was naked and B.R.'s pajama bottoms and panties had been removed. Jason told Daniel that he had no idea how he ended up in B.R.'s room. He admitted to the police that he had touched the girl, but said he did so accidentally.

Daniel asked B.R. whether Jason had touched her, and B.R. replied, "yes." B.R. told a Pierce County Prosecutor's Office child interviewer that "someone" had "loved" on her, and that "Jason" had come into her room. B.R. also indicated that Jason had been naked in her bed, that he removed her panties, and that she felt "loving" on her tummy. Additionally, B.R. told the pediatric nurse practitioner who evaluated B.R. at Mary Bridge Children's Hospital that Jason had touched her body near her genital area, and that it felt "like it hurted," and that he had removed her panties.

The State charged Jason with first degree child molestation. At trial, B.R. contradicted her pre-trial hearsay statements, and testified that she had never been touched by Jason. Counsel for Jason advanced a voluntary intoxication defense, claiming Jason was so intoxicated that he could not have intended sexual gratification. In support of this defense he presented the testimony of Dr. David Moore, an expert on the effects of intoxication on cognitive abilities. Counsel for Jason also proposed a voluntary intoxication jury instruction, which was given by the court. Additionally, defense counsel proposed an instruction for the lesser included offense of fourth degree assault, but withdrew the proposed instruction after consulting with his client.

The jury convicted Jason of first degree child molestation. Jason appeals.

DISCUSSION

Standard of Review

Jason claims his trial attorney provided ineffective assistance of counsel. The purpose of the effective assistance of counsel guarantee of the Sixth Amendment is to ensure that a criminal defendant receives a fair trial. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, Jason must demonstrate (1) deficient performance, i.e., that his attorney's representation fell below the standard of reasonableness; and (2) resulting prejudice, i.e., that but for the deficient performance, the result would have been different. Strickland, 466 U.S. at 687; State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) (adopting the standards in Strickland). If a defendant fails to establish either prong, the court need not inquire further. State v. Standifer, 48 Wn. App. 121, 126, 737 P.2d 1308 (1987).

To establish deficient performance, Jason has the heavy burden of showing that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. There is a strong presumption of effective representation of counsel, and the defendant has the burden of showing that, based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). As the Supreme Court explained in Strickland:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

> unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689 (citation omitted). Here, Jason claims defense counsel was ineffective because (1) counsel's proposed voluntary intoxication instruction should have included a reference to the defendant's ability to intend sexual gratification; and (2) counsel failed to obtain a jury instruction on fourth degree assault as a lesser included offense of first degree child molestation.

Voluntary Intoxication Instruction

Jason claims his trial attorney was ineffective for failing to include a reference to Jason's ability to intend sexual gratification as part of the voluntary intoxication instruction. We disagree.

Instructions are adequate if they allow a party to argue its theory of the case and do not mislead the jury or misstate the law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The voluntary intoxication instruction that was proposed by defense counsel, accepted by the trial court, and given to the jury reads:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Instruction 7.

Jason contends this instruction was "contrary to the purpose of the voluntary intoxication statute," and that it led to a situation where the State was relieved of its

burden of proving Jason acted with the intent to sexually gratify himself.[1] Jason points to the voluntary intoxication pattern instruction, which permits the parties to fill in the mens rea element of the charged crime.[2] Jason argues that defense counsel should have proposed an instruction that, rather than simply using the word "intent," instead included a specific reference to Jason's ability to intend sexual gratification:

> A more effective and correct instruction would have read, "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with the ability to form the desire and understanding that his actions would sexually gratify him."

Jason further argues that Instruction 7, in conjunction with the prosecutor's cross-examination of Dr. Moore, the defense's expert witness, gave the jury the incorrect impression that "nothing more than a 'volitional' act was required to prove that [Jason] acted with the requisite 'intent.'"

Jason's arguments, however, ignore other instructions given to the jury that were relevant to this issue. Specifically, in addition to Instruction 7, the court gave a "to-convict" instruction,[3] an instruction defining "intent,"[4] and an instruction defining the meaning of "sexual contact" for purposes of the first degree child molestation statute.[5]

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[1] The first degree child molestation statute provides: "A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). Sexual contact is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

[2] "However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with (fill in requisite mental state)." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 18.10, at 282 (3d ed. 2008).

[3] "To convict the defendant of the crime of child molestation in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about the 16th day of June, 2007, the defendant had sexual contact with B.R. . . ." Instruction 9.

[4] "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime." Instruction 10.

"[A]s a general legal principle all the pertinent law need not be incorporated in one instruction." State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). It is well settled that jury instructions "must be read together and viewed as a whole." State v. Teal, 117 Wn. App. 831, 837, 73 P.3d 402 (2003), aff'd, 152 Wn.2d 333, 96 P.3d 974 (2004). Here, when viewed as a whole, the instructions required the jury to find that Jason had touched B.R.'s sexual or intimate parts, and that he did so intending to gratify his sexual desires. Likewise, the instructions permitted the jury to consider whether Jason's voluntary intoxication affected his ability to intend sexual gratification. Indeed, defense counsel used these instructions to form the gravamen of his closing argument, that Jason was too intoxicated to have intended sexual gratification:

> Now, the issue, the issue in this case is: What was the intent that occurred on that early morning or evening or whenever it was? Intent is defined for you in Instruction Number 10 as, "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime."
>
> Well, the object or purpose to do something. "A" equals "B" because you intend to bring about those consequences.
>
> The reason that the law, not me, but the reason that the law recognizes that alcohol can have an effect on the person's ability to form the intent is based upon the testimony from Doctor Moore. And when you take a look at Instruction Number 7, it says that, "Evidence of intoxication may be considered in determining whether the defendant acted with intent." That's what we're getting to.
>
> And the – the primary instruction that you are to consider in this case for purposes of this particular offense, the child molestation charge is Instruction Number 11 which defines sexual contact. And sexual contact is defined as the "touching of the sexual or other intimate parts of a person" -- so limited to those, "the sexual or other intimate parts of a person done for the purpose" -- the specific purpose "of gratifying sexual desires."
>
> So simply going and touching somebody doesn't complete the task. It has to be done with the specific purpose, a directed purpose of gratifying sexual desires.

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[5] "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party." Instruction 11.

> Now, when you put the instructions to the facts in the case, respectfully, you can't just gloss over, well, he was drunk. He wasn't just drunk. He was passed-out drunk. He was passed-out drunk, not-able-to-function drunk. He was incoherent based upon the testimony from Melissa . . . .
> . . . He is intoxicated. And he said, "I don't have a recollection. I did not touch her intentionally. If I touched her, it was by accident."

Jason also points to a question from the jury during its deliberations. The jury asked the court whether "for the purpose of" equaled "intent." Jason claims this is evidence the jury was misled by the instructions. The thought processes of the jury during deliberations, however, "inhere in the verdict," and a question from the jury does not create an inference that the entire jury was confused or that any confusion was not clarified before the verdict was reached. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). Questions from the jury may not be used to impeach a verdict. Id.

In sum, the jury instructions proposed by defense counsel did not mislead or misstate the law, and they permitted Jason to argue that voluntary intoxication prevented him from intending sexual gratification. As such, counsel's performance in crafting the instructions relating to voluntary intoxication was not deficient, and Jason suffered no prejudice.

Lesser Included Offense Instruction

Jason next contends that counsel was ineffective for withdrawing the proposed jury instruction on fourth degree assault as a lesser included offense of the charge of first degree child molestation. Relying on our decisions in State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010), and State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004), Jason asserts that there were no legitimate strategic or tactical reasons for withdrawing the lesser included instruction, and that he was prejudiced because the jury was not given the option of

finding him guilty of the lesser included offense. The State concedes that if requested, the lesser included instruction on fourth degree assault would have been given. The State contends, however, that the decision to not ask for the instruction was a legitimate trial strategy. We agree.

"The decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal." State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009) (citing State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979), and State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991)). In King, a prosecution for assault in the second degree, we held that counsel was not ineffective for failing to request a lesser included instruction on simple assault because "[i]t was an all-or-nothing tactic that well could have resulted in an outright acquittal." King, 24 Wn. App. at 501. In Hoffman, the Supreme Court rejected the claim that the court erred in acquiescing to the defense request to not give lesser included instructions because the "[d]efendants' decision to not have included offense instructions given was clearly a calculated defense trial tactic." Hoffman, 116 Wn.2d at 112.

In both Ward and Grier we considered the risk in proceeding without a lesser included instruction and held that, on the facts presented in those cases, the decision to do so was so objectively unreasonable as to constitute ineffective assistance of counsel. Ward, 125 Wn. App. at 250; Grier, 150 Wn. App. at 640.[6] While Jason contends this is also true in his case, we disagree. In Grier, we found that the viability

[6] See also State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006) (following Ward, holding counsel was ineffective for failing to seek a lesser included criminal trespass instruction to the charge of residential burglary).

of the defendant's self-defense theory was greatly diminished by evidence that Grier's act of shooting and killing the decedent was a highly disproportionate response to the decedent's act of "advancing toward Grier and shoving her." Grier, 150 Wn. App. at 643. Likewise, in Ward, the credibility of defendant's testimony in support of his self-defense claim was "greatly impeached" by the testimony of the arresting police officers. Ward, 125 Wn. App. at 250.

Here, however, the evidence strongly supported Jason's defense of voluntary intoxication. While Jason did not testify at trial, his hearsay statements to the police and Daniel and Melissa were consistent with a voluntary intoxication defense to the molestation charge. As Jason admits in his opening brief, the evidence that both Jason and Daniel were extremely intoxicated was overwhelming and undisputed. In addition, B.R.'s trial testimony was favorable to Jason because she denied that she had been touched by him. Thus, in the instant case, the all or nothing strategy was reasonable because the question of whether the State could prove the elements of the charged offense beyond a reasonable doubt was a close one. Moreover, in contrast to Ward and Grier, in this case there is no identified set of circumstances which so undermined the all or nothing approach that the decision to pursue it as a trial strategy was objectively unreasonable.

Hassan is instructive. In Hassan the defendant was convicted of possession of marijuana with intent to deliver. On appeal, he argued that defense counsel was ineffective for failing to propose an instruction on the lesser included offense of simple possession of marijuana. We noted, consistent with our decision in Ward, that "the determination of whether an all or nothing strategy is objectively unreasonable is a

highly fact specific inquiry." Hassan, 151 Wn. App. at 219. But, unlike Ward, in Hassan there was no evidence which so undermined Hassan's defense to the charged offense that the all or nothing strategy was objectively unreasonable. Indeed, in Hassan, as in the instant case, the statements of the defendant were unimpeached and were consistent with the other evidence presented to the jury. There was also testimony which corroborated the defendant's version of events. Thus, in Hassan, we concluded that counsel was not ineffective and affirmed the defendant's conviction. Likewise, here, we cannot say that the decision to withdraw the proposed instruction on the lesser included offense of fourth degree assault was objectively unreasonable.

Moreover, on the record before us, defense counsel withdrew the proposed lesser included instruction only after consultation with Jason. In Hassan we held the defendant's awareness of the risks posed by pursuing an all or nothing strategy was significant:

> Hassan's testimony at trial also indicates he was aware of the risks of pursuing an all or nothing strategy in an effort to obtain an acquittal. In assessing the defense strategy and deciding to testify that he committed the lesser offense of possession, Hassan would have been aware of his right to request an instruction for that offense.

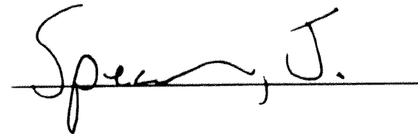
Hassan, 151 Wn. App. at 220. Thus, in both Hassan and this case, the defendants were aware of the risks in pursuing an all or nothing strategy, but chose to do so anyway, as was their right. See RPC 1.2(a);[7] Hoffman, 116 Wn.2d at 112.

In sum, viewing all of the facts in the record before the court in context, Hassan, 151 Wn. App. at 219, we hold counsel's decision to not pursue a lesser included instruction of fourth degree assault was not objectively unreasonable. Because Jason

[7] "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

has not carried his burden of establishing deficient performance, his claim of ineffective assistance of counsel fails, and we affirm his conviction.

Affirmed.



WE CONCUR: