

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 66039-0-I
)
 Respondent,) DIVISION ONE
)
 v.) UNPUBLISHED OPINION
)
 ALLEN JACK FROST,)
) FILED: May 29, 2012
 Appellant.)
)

Grosse, J. — Where no evidence suggests that a rape victim had a psychiatric disorder at any relevant time, defense counsel does not provide ineffective assistance by not seeking to present irrelevant evidence on that issue at trial. Allen Jack Frost fails to rebut the strong presumption that his trial counsel’s actions were reasonable and effective in his three-week bench trial for rape in the third degree. We affirm the judgment and sentence.

FACTS

In January 2008, the victim, B.C., then 18, lived in the basement of Frost’s house with Frost’s stepson, Logan Corey, her intimate partner and father of her 6-month-old infant. B.C. and Corey were addicted to heroin. On January 5, Corey entered inpatient chemical dependency treatment. The next day, Frost came into B.C.’s bedroom and initiated sexual contact. This culminated in penile-vaginal intercourse. B.C. did not consent to the intercourse.

B.C. continued to live in Frost’s house. Although Frost knew that B.C. and

Corey were addicted to opiates, he began to provide B.C. between \$20 and \$100 almost daily over the next year. This money enabled B.C. and Corey to continue using heroin.

B.C. did not report the rape until a year later, when she decided to stop using heroin. She first reported the rape in January 2009 to counselor Alice Adams in an intake appointment for chemical dependency treatment. Soon thereafter, she disclosed the rape to her mother. B.C. reported the rape to a King County Sheriff's officer on March 3, 2009, after she graduated from the treatment program.¹ This led to the defendant's prosecution. By the time of trial, B.C. had custody of her child and was maintaining sobriety, but custody proceedings were ongoing.

At Frost's trial, B.C. testified regarding the rape. She detailed the attack and her efforts to stop it. She also explained that Frost instructed her not to report the rape, because she was an addict and no one would believe her. She testified that Frost threatened to reveal her addiction if she reported the rape, and she was afraid she would lose her child. B.C. believed that the money Frost gave her almost daily thereafter was intended to keep her silent about the rape.

Frost testified at trial. He admitted that he was alone with B.C. in her bedroom the day after Corey went to treatment. He claimed that he observed her illness from withdrawal, confronted her about her addiction, and gave her a lower back massage. He denied that any sexual contact occurred.

The trial court found Frost guilty as charged, and made a factual finding that

¹ On February 18, 2009, while B.C. was in inpatient treatment, Frost and his wife Carol filed for third-party custody of B.C.'s child. By March 2009, B.C. was aware that the petition had been filed.

B.C. was credible in her account of the rape:

[B.C.] was able to recount the rape in great detail. I believe that her report remained consistent, in spite of many inquiries and many rounds of examination. . . . I was convinced in watching her in this courtroom that she was telling the truth. Her reaction to the questions, her body language, the way she conducted herself and the way she answered to me was indicative of someone who was profoundly and permanently affected, in a negative way, consistent with an event of this nature.

Frost filed a motion for a new trial, alleging that his trial counsel provided ineffective assistance. With the motion, Frost submitted the written declarations of his own counselor, Dr. Kevin Connolly.

Dr. Connolly asserted that B.C. acknowledged a prior diagnosis of bipolar disorder, and suggested that bipolar affective disorder “can go hand in hand with a personality disorder, such as borderline personality disorder or psychopathic personality disorder.” He recommended that these diagnoses “should be explored in [B.C.’s] case.” Dr. Connolly explained that it can be difficult for others to know when an individual with borderline personality disorder is lying. Dr. Connolly also opined that B.C.’s later actions, such as allowing Frost and his wife to care for her child, were inconsistent with her allegations of rape, and were “consistent with what is called a ‘psychopathic slip,’” that is, “a slippage in her story that Jack truly was a rapist.”

The trial court rejected Frost’s argument that his counsel’s failure to call Dr. Connolly as a witness was ineffective, and denied the motion for a new trial.

Frost filed a second posttrial motion seeking discovery of B.C.’s mental health records and ordering her to undergo a mental health examination. The trial court denied the motion, finding:

At trial, the victim was examined at great length for approximately three

days, and many witnesses testified about the victim (including defense witnesses who personally knew the victim as well as the defendant himself) on the Defendant's behalf, but no evidence was elicited to support the theory that the victim was psychologically unstable during the relevant time period

Frost appeals.

ANALYSIS

Frost contends that his trial counsel was ineffective for failing to present evidence of B.C.'s mental health condition and for conducting inadequate investigation of issues pertaining to her credibility. We disagree.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below a minimum objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result would have been different.² "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness."³ Accordingly, reviewing courts will make "every effort to eliminate the distorting effects of hindsight."⁴ A decision made by trial counsel for legitimate strategic or tactical reasons does not amount to ineffective assistance.⁵ Claims of ineffective assistance of counsel are mixed questions of law and fact and are reviewed de novo on appeal.⁶

² State v. West, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

³ State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689).

⁴ In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

⁵ State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

⁶ In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Tactical Decisions Regarding Evidence

Frost first asserts that his trial counsel was ineffective for failing to present Dr. Connolly or another comparable mental health expert to testify regarding B.C.'s credibility. Generally, the decision whether to call a particular witness is presumed to be a matter within the realm of legitimate trial tactics.⁷ And “[a] criminal defendant has ‘no right, constitutional or otherwise, to have irrelevant evidence admitted’ in his or her defense.”⁸

Frost fails to identify any relevant evidence a mental health expert might have offered to challenge B.C.'s credibility. While expert testimony may include opinions based on specialized knowledge within the experience of the witness, that testimony must be relevant to be admissible.⁹ Evidence offered to impeach a witness's credibility is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action.¹⁰

Significantly, there is no evidence in the record that B.C. suffered any mental disability at the time of the rape or at the time of trial. The only evidence that B.C. ever had a mental health condition was her own report that she was diagnosed with

⁷ In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

⁸ State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002)). Under ER 401, “[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” See, e.g., State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). Under ER 402, “[e]vidence which is not relevant is not admissible.” See, e.g., Weaville, 162 Wn. App. at 818.

⁹ ER 402; ER 702; State v. Atsbeha, 142 Wn.2d 904, 917-18, 16 P.3d 626 (2001).

¹⁰ State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999).

depression and bipolar disorder when she was 13 years old.¹¹ This mere reference is inadequate to support any reasonable inference that she was affected by such a condition at any time relevant to Frost's trial.

Dr. Connolly's declarations likewise fail to establish that B.C. had any disorder at the relevant times. Dr. Connolly did not purport to have diagnosed B.C. with any disorder. Dr. Connolly's statement that bipolar disorder "can go hand in hand with a personality disorder" sheds no light whatsoever on whether B.C., in fact, had a personality disorder. Dr. Connolly's opinion about personality disorders is not relevant to the issue of B.C.'s credibility, absent evidence that B.C. actually had such a disorder. Given the entirely speculative nature of Connolly's declaration, it includes no evidence that would be probative of the issues at trial.

Frost also argues that counsel's failure to call Dr. Connolly was deficient because Dr. Connolly "recommended a psychiatric evaluation" and "[t]he court could have ordered one." Frost's argument is not persuasive. While the granting or denying of a motion for a psychiatric examination of a witness is within the sound discretion of the trial court,¹² such an examination may only be ordered upon a showing of a "compelling reason" for doing so.¹³ Absent this showing, other, more traditional means of assessing witness credibility and perceptual ability are sufficient.¹⁴

Frost fails to identify any compelling reason in the record that would "overcome

¹¹ Defense counsel did not ask B.C. about the purported diagnosis, but did bring out that detail in cross-examination of the counselor, Alice Adams.

¹² State v. Israel, 91 Wn. App. 846, 849, 963 P.2d 897 (1998); State v. Weisberg, 65 Wn. App. 721,727, 829 P.2d 252 (1992).

¹³ Israel, 91 Wn. App. at 850; State v. Demos, 94 Wn.2d 733, 738, 619 P.2d 968 (1980).

¹⁴ Israel, 91 Wn. App. at 850.

the strong presumption that psychological examinations of witnesses to crimes shall not be allowed”¹⁵ and justify a mental health examination of B.C. The more traditional means of assessing B.C.’s credibility, such as confrontation, cross-examination, and impeachment with prior inconsistent statements, were effectively utilized by Frost’s trial counsel.

The defense theory was that B.C. was a liar, a manipulator, and a bad mother, and those themes were thoroughly developed by defense counsel at trial. On cross-examination, which lasted more than a day, B.C. admitted that she stole and routinely lied in connection with her drug addiction. Defense counsel’s examination also revealed that B.C. made inconsistent statements about whether and how she had forged numerous checks. B.C. admitted that she irresponsibly used heroin while providing daycare for another family’s children, and around her own child. Numerous defense witnesses described instances where B.C. engaged in check thefts, check forgeries, unauthorized ATM withdrawals, thefts of cash and personal items from the Frosts, and other irresponsible behavior. Frost also testified that B.C. was able to mislead him about her drug use by successfully concealing her use of heroin for long periods of time.

Frost’s contention that B.C. had a disorder that enabled her to lie convincingly is contravened by the trial court’s findings that B.C. lied in the past, was not credible in all of her testimony, and had previously lied in court:

There is no doubt that [B.C.] has given inconsistent stories about a number of things in the past, including the theft, inconsistent stories to the judge hearing the child custody case, inconsistent stories to the

¹⁵ Israel, 91 Wn. App. at 852-53.

authorities who were investigating various allegations of drug possession.

...

Frost argues that expert testimony was necessary to explain B.C.'s actions that were allegedly inconsistent with her having been raped, such as allowing the Frosts to repeatedly care for her child. However, evidence that B.C. left her child with the Frosts was before the court, and was relied on by defense counsel to argue that the rape allegation was a fabrication. This evidence was strategically used by defense counsel at trial, and tended to call B.C.'s credibility into question. It was a reasonable tactical decision to present this evidence to the court without attempting to anchor it in Dr. Connolly's speculative opinion testimony.

Frost has not demonstrated ineffective representation of counsel regarding the choice of witnesses and evidence to present at trial.

Adequate Investigation

Frost also asserts that his defense counsel did not conduct an adequate investigation, because he did not interview Dr. Connolly and allegedly refused to read his declarations, did not consult other psychological experts, and did not try to gain access to B.C.'s mental health records. Specifically, Frost argues that such an investigation would have allowed trial counsel to "ask pertinent questions about [B.C.'s] history of mental illness."

When the allegation of ineffectiveness of counsel relates to failure to investigate, "a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments."¹⁶

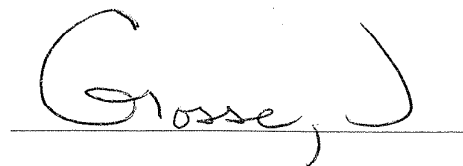
¹⁶ In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007).

Because there was no evidence that B.C. suffered from any disorder at any pertinent time, and no means available to compel an examination or production of mental health records, Frost fails to demonstrate any fault in his counsel's investigation. Moreover, the defense investigation in this case was thorough. Defense counsel was familiar with the contents of the parallel family court proceedings, and effectively attacked B.C.'s credibility by producing prior declarations and testimony from those proceedings. The defense also produced many other documents to undermine B.C.'s testimony and to corroborate defense witnesses.

Frost has not identified any aspect of his counsel's performance that overturns the strong presumption of reasonable representation on appeal.¹⁷ We need not address the question of prejudice.

Frost's statement of additional grounds for review concerns the same issues raised by his appellate counsel. For the same reasons we reject appellate counsel's arguments, Frost's arguments are unavailing.

We affirm.

A handwritten signature in cursive script, reading "Grosse, J.", is written above a horizontal line.

WE CONCUR:

¹⁷ Thomas, 109 Wn.2d at 226.

Sperry, A.C.

Cox, J.