IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66938-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
CHARLES JEFFREY DAVIS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 5, 2011

SPEARMAN, J. — Charles Davis was convicted by a jury of rape in the first degree for the 2001 rape of K.C. In 2009, the DNA profile developed from semen in K.C.'s rape kit was matched to Davis. Davis told police that the two had consensual sex and sought to introduce evidence from K.C.'s former friend about K.C. apparently engaging in prostitution around the time of the alleged rape. On appeal, he claims that (1) the trial court erred in refusing to admit the sexual conduct evidence, (2) the evidence was insufficient to support the jury's verdict, and (3) he received ineffective assistance of counsel. We hold that Davis failed to preserve his claim as to the sexual conduct evidence, but that even if the issue was properly preserved, the trial court did not abuse its discretion. We also hold that the evidence at trial supported the verdict and that Davis did not receive ineffective assistance of counsel based on the record

before us. We affirm.

FACTS

On Sunday, September 23, 2001, K.C., a 16-year-old girl, was dropped off at the Lacey transit center by her mother. K.C. told her mother she was going to see a friend, but she was actually planning to see her much-older boyfriend, of whom her mother did not approve. At the transit center, K.C. saw a group of six or seven young men wearing blue clothing, blue bandanas, and gold jewelry, and approached them to ask where to find bus schedules. The young men told her to shut up, then pushed her into the men's restroom. K.C. testified that her arms and legs were held down and she was raped vaginally by one or possibly two of the men. She was scared because she did not know if they were armed. The men then left the restroom. K.C. was bleeding from her vagina. She stayed in the restroom for about five minutes, then cleaned up and left. A security guard was sitting in his parked vehicle near the men's restroom, reading a newspaper, but K.C. did not report the rape. She first went to see her boyfriend and later went home. K.C. told her boyfriend about the rape but the two of them decided not to call the police. She did not tell her parents.

While K.C. was at school the next day, she was in pain, so she reported the rape to school authorities. She was taken to St. Peter's Hospital, where an examination and rape kit were performed by Dr. Joseph Pellicer and a sexual assault nurse examiner. While it was standard practice for a nurse examiner to conduct the exam, Pellicer was also involved because a "procedural sedation"

had to be performed due to K.C.'s pain and discomfort. Pellicer observed a vaginal laceration that extended "from the vaginal fourchette approximately 8 to 10 millimeters into the floor of the vagina." He testified that, based on his training and experience, this type of injury was not consistent with consensual sexual intercourse.[1] K.C. had no bruises or cuts on any other part of her body. The nurse examiner described K.C.'s demeanor as "quite scared, anxious, very uncomfortable." K.C. was contacted at the hospital by Detective Beverly Reinhold, who described her as very distraught. A DNA profile was developed from semen samples taken from the rape kit but no profile match was found at that time.

Approximately eight years later, in April 2009, the DNA profile developed in K.C.'s case was matched to the DNA profile of Charles Davis.[2] Detective Reinhold learned that the day after K.C. was assaulted Davis had pawned a gold bracelet in Olympia. After locating Davis, Reinhold advised him of his Miranda[3] warnings and informed him that she was investigating a 2001 sexual assault at

[1] He testified, "If a woman is resisting intercourse, it's the type of injury that you see. The muscles are very tight and the skin around the vagina tears."

[2] William Dean, a forensic scientist with the Washington State Patrol Crime Laboratory, testified that he located semen in the biological samples taken from K.C.'s rape kit. He testified that the genetic profile from that semen was matched, in April 2009, to an individual and that he then requested the police to obtain a reference sample from that individual to perform additional testing. The police obtained a sample from that individual, Charles Davis, and additional testing confirmed that the genetic profiles matched to a very high degree of scientific certainty. The DNA hit arose after Davis was arrested on a felony drug charge in 2008 and underwent a DNA test pursuant to that conviction, although this evidence was not presented to the jury.

[3] Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L.E.2d 694 (1966).

the Lacey transit center. Davis agreed to talk, though not to be recorded, and told Reinhold that, years ago, he had had consensual sex with a girl in the men's restroom at the transit center. He said that the two had just met and talked about having sex, one of them suggested going to the bathroom, they had sex for less than two minutes, and then the girl got on a bus and left. Davis commented that Reinhold should just check the videotape to see what happened. Reinhold informed him there was no video recording at the time.

Davis was charged by amended information with one count of rape in the first degree or, in the alternative, rape in the second degree. Before trial he filed a motion to admit evidence of K.C.'s past sexual behavior to support his consent defense, pursuant to the rape shield statute, RCW 9A.44.020. The offer of proof in support of the motion was the Declaration of Jenny Anderson, in which Anderson stated that she believed K.C. prostituted herself in 2001.[4] Judge Gary

[4] Anderson's declaration stated:

> In October of 2001, when I was fourteen or fifteen, I ran away from home with [K.C.]. Both of us went to the "Hilltop" area of Tacoma, WA and stayed, for the most part, with [K.C.'s] boyfriend, Curtis. . . . He lived with another man named Darryl. I was there less than a month before I called a social services agency because I wanted to come home. Shortly after I returned home, the police found [K.C.] in the Hilltop area and returned her to her family.
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> [K.C.] was involved in a sexual relationship with Curtis at this time. I know this from living in close proximity to them in Tacoma. In particular, I overheard them having sex on more than one occasion at the residence. She further abused alcohol and drugs with him – in particular, crack cocaine. This, I personally observed. While in Tacoma, I did not use illegal drugs, but I did drink alcohol.
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> Certain facts persuade me that [K.C.] prostituted herself when we both lived in Tacoma, though I can't say this for certain. I recall several times when [K.C.], in public, would walk up to cars, speak with the occupants, and then climb inside and leave the area in the company of the people she had spoken with. I was not close enough to these interactions to overhear any specific conversations, but it did not appear to me that [K.C.] knew the occupants of these cars before leaving with them. I also recall that [K.C.'s] choice of clothing made me think she was working as a prostitute, and that she frequently had money to spend, though she

Tabor denied Davis's motion, entering findings of fact and conclusions of law. He ruled that the evidence was not admissible because (1) at that time there was no evidence indicating that Davis and K.C. had sex as an act of prostitution and therefore the evidence was not relevant to the facts, (2) Anderson's opinion was outside of her personal knowledge, (3) the prejudicial effect of the evidence outweighed its probative value, and (4) the exclusion of the evidence would not result in a denial of justice to Davis. He indicated that his ruling was based on the posture of the case at that time, and that he might re-hear the matter if circumstances changed.

Judge Paula Casey presided over the jury trial. The State filed a motion in limine regarding the previous ruling by Judge Tabor. The prosecution and defense counsel agreed it would not be proper for the defense to present

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> didn't have a job. The source of this money, to the best of my knowledge, was her boyfriend, Curtis. This last fact, along with the large difference in age between [K.C.] and her boyfriend, further makes me think that Curtis may have been acting as [K.C.'s] pimp during the time [K.C.] and I stayed in Tacoma.
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> I recall one incident at a 7-11, in Tacoma, in particular. [K.C.] and I were there to use the phone, to arrange for Curtis to pick us up. It was late at night. While we were there, [K.C.] approached a car that had pulled into the parking lot and began talking with the car's occupants – at least two men. After a short conversation, [K.C.] got into the car with these men and left the area. I did not see her again until the next morning, back at Curtis' house. Later, [K.C.] asked me to lie about this incident and to tell Curtis, if he asked, that the men in the car had raped her. I believe she asked me to say this because she was worried that Curtis would be upset if he learned that she had gone with the men willingly.
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> [K.C.], in fact, asked me to "cover" for her with Curtis on more than one occasion. Most of these requests from [K.C.] concerned her behavior involving men besides Curtis. I believe she did not want Curtis to know that she was spending time with other men besides him when we both lived in Tacoma.
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> When we were in Tacoma, [K.C.] never mentioned being raped in September of 2001, in Lacey. I did not learn of this incident until I was contacted by Paula Howell, a private investigator retained by Mr. Kaufman to investigate his case, in 2009. Given her behavior as I recall it in 2001, I don't believe that [K.C.] was raped at that time. Instead, I believe that [K.C.] lied to police investigators so that Curtis would not know she had willingly had sex with another man.

evidence from Jenny Anderson without first making a motion to reopen the issue, as required by Judge Tabor's ruling. Judge Casey agreed. The defense did not seek to offer Anderson's testimony at trial.

Davis testified in his own defense. He denied raping K.C. He testified that he was alone at the transit center on September 23, 2001 when he was approached by K.C. Davis wore a lot of jewelry and K.C. told him that she liked his jewelry. The two talked for 15 to 20 minutes. The topic of sex came up, and K.C. indicated that she was a prostitute. She agreed to have sex with him in exchange for $25, and the two also agreed that Davis would buy $40 worth of crack cocaine from K.C.'s boyfriend and split it with her. They observed security guards in the area, so they decided that he would first go into the men's restroom and she would follow. They had sex for about two minutes, after which they got on a bus and met K.C.'s boyfriend at the Olympia transit center. Davis did not like K.C.'s boyfriend and decided to leave without buying drugs. He acknowledged pawning a bracelet the next day.

The jury found Davis guilty of rape in the first degree. He was sentenced to a standard-range sentence of 136 months to life.

DISCUSSION

Davis first argues that the trial court erred in denying his motion to admit evidence of K.C.'s prior sexual conduct. Second, he argues that the evidence was insufficient to support the jury's verdict. Finally, he claims ineffective assistance of counsel. We find no merit in Davis's claims and affirm.

Evidence of K.C.'s Prior Sexual Conduct

Under the rape shield statute, evidence of the victim's past sexual behavior is admissible on the issue of consent only if: (1) it is relevant; (2) its probative value substantially outweighs the probability that its admission will create a substantial danger of undue prejudice; and (3) its exclusion will result in denial of substantial justice to the defendant. State v. Hudlow, 99 Wn.2d 1, 16-17, 659 P.2d 514 (1983) (applying former RCW 9.79.150(3) (1979), now recodified as RCW 9A.44.020(3)). The admissibility of past sexual behavior evidence is within the sound discretion of the trial court. Id. at 17 (citing State v. Blum, 17 Wn. App. 37, 46, 561 P.2d 226 (1977)).

Davis argues that the trial court violated his Sixth Amendment right under the United States Constitution to present evidence to support his consent defense. He argues that the Anderson evidence was admissible under the rape shield statute, RCW 9A.44.020,[5] and that it was relevant because it showed a pattern of sexual conduct. He cites State v. Jones, 168 Wn.2d 713, 230 P.3d

[5] RCW 9A.44.020, the rape shield statute, provides in pertinent part:
. . .
(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section . . . .

The purpose of the statute was to prevent the misuse of prior sexual conduct evidence so that a woman's general reputation for truthfulness could not be impeached because of her prior sexual behavior. Hudlow, 99 Wn.2d at 8. Evidence of prior sexual conduct cannot be used to attack the victim's credibility. But "[f]actual similarities between prior consensual sex acts and the questioned sex acts claimed by the defendant to be consensual" would cause the evidence to be relevant under ER 401. Id. at 11.

576 (2010) for the proposition that even if the rape shield statute applies, it could not be used to deprive him of his right to present a defense. He contends that the error was not harmless beyond a reasonable doubt.

The State argues that Davis failed to preserve the issue for appeal because he did not attempt to introduce the evidence at trial. It points out that at the pretrial hearing, Judge Tabor indicated that the issue could be raised again.

We agree with the State and hold that Davis did not properly preserve the issue for appeal. We note, moreover, that even if the issue was preserved, the trial court did not abuse its discretion in ruling that the evidence was not admissible based on where the case stood at the time. For appeals arising from a trial court's rulings on motions in limine, a waiver of the right to raise the issue on appeal depends on whether the trial court made a final ruling. See State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). If it did, "the losing party is deemed to have a standing objection . . . '[u]nless the trial court indicates that further objections at trial are required when making its ruling.'" Id. (quoting State v. Koloske, 100 Wn.2d 889, 895, 676 P.2d 456 (1984)) (alteration in original). But when the ruling is tentative, "'any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.'" Powell, 126 Wn.2d at 257 (quoting State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)).

Here, Judge Tabor made a pretrial ruling based on the defense's offer of proof, stating that "my ruling today is based on the posture of the case before me

at this time." He noted that there was presently no evidence that Davis and K.C. had sex as an act of prostitution, so any evidence that K.C. might have prostituted herself on another occasion was not relevant. He also noted that the issue could be brought back should circumstances change. When Davis testified at trial that the sex with K.C. was a consensual act of prostitution, this was arguably a change in circumstances that would warrant reconsideration of his motion. But Davis did not offer Anderson's testimony or ask the trial court to reconsider the issue. Therefore, he failed to preserve the issue for appeal.

We note that even if the issue was preserved, the trial court did not abuse its discretion. While defendants have "a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence."[6] State v. Aguirre, 168 Wn.2d 350, 362–63 (2010) (citing State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009)). Here, the record reflects that at the time of the pretrial hearing, there was no evidence that K.C. had sex with Davis as an act of prostitution. The trial court observed that defense counsel appeared to have decided upon this as a matter of strategy that counsel would discuss with Davis as the case moved forward. Absent evidence regarding prostitution, the trial court properly ruled that Anderson's testimony

[6] Davis relies on Jones to argue that the rape shield statute cannot be used to deprive him of the right to present a defense, but Jones is inapposite. There, the trial court ruled that the rape shield statute prohibited the defendant in a rape trial from testifying about his version of events on the night of the alleged rape. 168 Wn.2d at 717–20. The Washington Supreme Court held that the trial court's refusal to allow this testimony violated the defendant's Sixth Amendment right to present a defense. Id. at 719–20. Here, Davis was not prevented from testifying as to his version of what happened between K.C. and himself. The evidence he sought to introduce related to what K.C. did on other occasions.

was not relevant. Furthermore, another basis for the court's ruling was Anderson's lack of personal knowledge under ER 602.[7] This was also a proper basis to exclude the evidence. Anderson's declaration stated, "I can't say [K.C. prostituted herself] for certain." Her opinion was based on K.C.'s approaching strangers and leaving with them, wearing certain clothing, and having money to spend.

Sufficiency of the Evidence

To prove that Davis committed rape in the first degree, the State was required to prove beyond a reasonable doubt:

(1) That on or about September 23, 2001, the defendant engaged in sexual intercourse with [K.C.];
(2) That the sexual intercourse was by forcible compulsion;
(3) That the defendant
    (a) inflicted serious physical injury, or
    (b) kidnapped [K.C.]; and
(4) That any of these acts occurred in the State of Washington

On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter,

[7] Under ER 602, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Id. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 740 P.2d 335, (1987)). Thus, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992) (citing State v. Longuskie, 59 Wn. App. 838, 801 P.2d 1004 (1990)).

Davis contends that K.C.'s testimony demonstrated that her claim of rape by forcible compulsion was suspect and argues that the State failed to establish proof beyond a reasonable doubt. He points out that K.C. admitted lying to her mother about taking the bus to see a friend rather than her boyfriend. Furthermore, although K.C. testified to struggling while being attacked, there were no cuts, scratches, or bruises on her body the next day. Davis also points out that he readily told police eight years later that he had consensual sexual intercourse with a girl at the transit center.

The State contends there was evidence that K.C. was raped, pointing to K.C.'s testimony and Dr. Pellicer's testimony that K.C.'s vaginal tear was

consistent with non-consensual intercourse. The State points out that K.C. testified that she did not report the rape immediately because she did not feel people would believe her. It also points out that Davis testified in his own defense and that there was conflicting evidence about his version of events at trial versus what he told Detective Reinhold when she interviewed him in 2009. It argues that the jury was permitted to accept or reject Davis's testimony.

We agree with the State. The evidence was undisputed that Davis had vaginal intercourse with K.C. The case turned on the conflicting testimony of K.C. and Davis as to whether such sex was consensual. K.C. testified that she was dragged into the restroom, that her arms and legs were held down, and that she was raped vaginally. She testified that she was in serious pain the next day. Dr. Pellicer testified that the vaginal tear she suffered was similar to the type of injury suffered by women giving birth and was consistent with non-consensual intercourse. This evidence was sufficient for a jury to find Davis guilty of rape in the first degree. The jury was entitled to weigh the evidence and make credibility determinations.

Ineffective Assistance of Counsel

Claims of ineffective assistance are mixed questions of fact and law that we review de novo. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under Strickland v. Washington, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to

establish either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). First, he must show that counsel's representation fell below an objective standard of reasonableness. Id. Only legitimate trial strategy constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Second, he must show that the deficient performance was prejudicial. Hendrickson, 129 Wn.2d at 78. Prejudice occurs when it is reasonably probable that but for counsel's errors, "'the result of the proceeding would have been different.'" State v. Lord, 117 Wn.2d 829, 883–84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694). There is a strong presumption of effective representation of counsel, and the defendant must show that there was no legitimate strategic or tactical reason for the challenged conduct. State v McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Davis claims in his Statement of Additional Grounds that he received ineffective assistance under the Sixth Amendment because defense counsel: (1) failed to prepare the case so that the defense investigator could testify; (2) failed to call certain transit employees as witnesses; (3) failed to contact the Gang Unit Task Force to determine that Davis had never been in a gang; (4) failed to call an expert witness, such as a rape trauma expert or physician, to rebut Dr. Pellicer's testimony that the only way K.C. would have sustained her injury would have been through non-consensual sexual intercourse; (5) refused to comply with Davis's request to present a motion for an interlocutory appeal of the rape-shield issue;[8] and (6) did not adequately consult with Davis. He contends that

collectively, these deficiencies amounted to a failure to adequately prepare a defense and prejudiced his trial. He contends that his version of events was supported only by his own testimony, and that the outcome would have differed had the jury heard corroborating testimony.

Davis's first claim relates to the defense's attempt to present the testimony of investigator Paula Howell, who interviewed K.C. on January 5, 2010. Howell was prepared to testify about inconsistencies between K.C.'s statements to police in 2001 and her statements to Howell, but soon after she took the stand, the trial court ruled that she could not continue because defense counsel had not asked K.C. on cross-examination about the issues he sought to rebut with Howell's testimony. Davis argues that counsel was ineffective in not preparing ahead of time so that Howell could testify. This claim fails because Davis cannot establish prejudice by the failure to admit Howell's testimony. The only inconsistencies in K.C.'s statements that are pointed out by Davis have to do with the position of her arms when she was raped and the number of stalls in the restroom. Even if Howell had testified about these inconsistencies, Davis cannot show that the result of the trial would have been different.

Davis's remaining claims involve matters outside the record. It is not possible, for example, to verify on the record what transit employees would have testified or to examine the communications between Davis and defense counsel.

[8] He contends that two months after Judge Tabor ruled on the admissibility of the evidence, the Washington Supreme Court issued its ruling in State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010).

This court does not, on direct appeal, consider matters outside the record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted). A defendant alleging ineffective assistance of counsel must show deficient representation based on the record below. Id. Davis fails to do so.

Affirmed.

Spearman, J.

WE CONCUR:

Ellington, J.

Becker, J.