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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of: BRANDON EUGENE DOCKTER, Petitioner.	No. 55004-1-II UNPUBLISHED OPINION

SUTTON, A.C.J. — Brandon Dockter seeks relief from personal restraint imposed as a result of his 2018 convictions for second degree rape and indecent liberties without forcible compulsion.[1] The State charged Dockter for an incident in which A.C., after smoking marijuana, fell asleep in a bed with her boyfriend, Harper, behind her. Later, her roommate, Cavagna, and her roommate's friend, Dockter, joined them. Cavagna had set "boundaries" for Dockter in which he was "just there to sleep." *State v.* Dockter, noted at 13 Wn. App. 2d 1023, 2020 WL 1917518, at *1. Neither A.C. nor Harper appeared to wake up. Cavagna went to sleep beside Harper and Dockter went to sleep behind her. After Harper left for work, A.C. awoke briefly to discover her shirt around her neck and someone behind her touching her nipples. She thought it was Harper and did not react. Cavagna awoke to discover that Dockter was now between her and A.C. She saw Dockter, whom A.C. had just met only briefly the previous evening, pull down his pants and "start thrusting" into A.C. Dockter, 2020 WL 1917518, at *1. A.C. awoke and yelled "who the f*** are you" at Dockter. *Id.*

[1] This court issued the mandate of Dockter's direct appeal, number 81038-3-I, on October 1, 2020, making his July 21, 2020 petition timely filed. RCW 10.73.090(3)(a).

The State initially charged Dockter with second degree rape for the act of intercourse, contending that A.C. was incapable of consent. Ten days before trial, the State moved to amend its information to add a count of indecent liberties without forcible compulsion for the act of sexual touching, again contending that A.C. was incapable of consent. Dockter's counsel did not object and the trial court granted the motion.

At trial, A.C. and Cavagna testified as described above. Dockter testified that he did not think that he needed to seek consent from A.C. because she had grabbed his hand and put it between her legs.

The court instructed the jury that "mental incapacity" means "incapable of consent by reason of being physically helpless or mentally incapacitated." Clerk's Papers (CP) at 130 (Instruction No. 6); Verbatim Report of Proceedings (VRP) at 312-13. The court also instructed the jury that "consent" means that "at the time of the act of sexual intercourse or contact, there are actual words or conduct indicating freely given agreement to have sexual intercourse or contact." CP at 132 (Instruction No. 8); VRP at 312. The trial court also instructed the jury on the definitions of "mental incapacity" and "physically helpless:"

> Mental Incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.
>
> A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

CP at 133 (Instruction No. 9); VRP at 312.

> During deliberations, the jury asked the following question:
>
> We need clarification as to the term mentally incapacitated. Does sleeping count as mental incapacitation?

CP at 120. In response, the trial judge proposed two options to counsel: (1) referring the jury to the instructions given or (2) explicitly referring to Instruction No. 9 defining mental incapacity. Dockter's counsel argued that the judge should instruct the jury to "please refer to your instructions [as] given," rather than "[h]ighlighting an instruction." VRP at 364. The judge answered the jury question as "[p]lease refer to your instructions." CP at 121. The jury subsequently found Dockter guilty of both second degree rape and indecent liberties without forcible compulsion. This court affirmed his convictions on direct appeal. Dockter, 2020 WL 1917518.

Dockter now argues that his trial counsel was ineffective by failing to object to the State's amendment of the information 10 days before trial to add the charge of indecent liberties. To establish ineffective assistance of counsel, Dockter must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court presumes strongly that trial counsel's performance was reasonable, and legitimate strategic decisions do not constitute deficient performance. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

Dockter demonstrates neither deficient performance nor resulting prejudice. The State's amendment to the information was based on the evidence already known to Dockter's counsel, not on newly discovered evidence. A defendant cannot claim error from the amendment of an information "unless he or she shows prejudice thereby." *State v. Collins*, 45 Wn. App. 541, 551, 726 P.2d 491 (1986). And "[t]he fact a defendant does not request a continuance is persuasive of lack of surprise and prejudice." *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Thus, there was no prejudice to Dockter by the amendment that would have justified counsel's objection or a motion for a continuance. Not objecting or moving for a continuance was not ineffective assistance of counsel.

Dockter next argues that his counsel provided ineffective assistance of counsel when indicating that the trial judge should respond to a jury question with the answer "please refer to your instructions [as] given" rather than explicating referring to Instruction No. 9 defining mental incapacitation.[2] We disagree. Dockter's counsel had a legitimate strategic reason for not arguing for a more specific answer, because referring to Instruction No. 9 in response could have highlighted that aspect of the case. Dockter again fails to show ineffective assistance of counsel.

Thus, we hold that Dockter does not show any grounds for relief from personal restraint and we deny his petition and his request for appointment of counsel.

[2] Dockter mistakenly claims that the jury was not read or provided with Instruction No. 9. But the record indicates that the jury was both read and provided with Instruction No. 9.

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 in accordance with RCW 2.06.040, it is so ordered.

SUTTON, A.C.J.

We concur:

MAXA, J.

GLASGOW, J.