IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent v. RAFAEL RIVERA, Appellant.	No. 39595-9-II UNPUBLISHED OPINION

Penoyar, C.J. — Rafael Rivera appeals an order denying his CrR 7.8 motion to dismiss his five first degree child molestation convictions. He claims that the trial court improperly denied his ineffective assistance claim, believing that this court had already addressed that claim in his direct appeal. In a statement of additional grounds for review (SAG), Rivera claims that the trial court abused its discretion in not finding that the prosecution fraudulently concealed material exculpatory evidence; that the court abused its discretion in not ordering a new trial based on newly discovered evidence; and trial counsel's failure to investigate and present material witnesses denied him his right to effective assistance of counsel. We affirm.

Facts

In 2006, a jury convicted Rivera of five counts of first degree child molestation.[1] The victims in those cases were MM, TAT, and TMT,[2] who were 9, 10, and 11 years old, respectively. All of the crimes occurred when Rivera was babysitting the children. This court affirmed those convictions in an unpublished opinion, *State v. Rivera*, filed July 3, 2007. Noted at

[1] We repeat only those facts necessary to resolve this appeal as we previously set out the facts in detail in Rivera's direct appeal. *State v. Rivera*, noted at 139 Wn. App. 1004, 2007 WL1893678.

[2] We refer to the victims by their initials to protect their anonymity.

139 Wn. App. 1004, 2007 WL1893678. This court held that (1) the trial court did not abuse its discretion in denying Rivera's motions to sever; (2) the record did not support his claim of ineffective assistance of counsel; (3) the record did not support his claim that he was denied his right to discovery; (4) the trial court's instructions did not deny him his right to a unanimous verdict; (5) the information adequately informed him of the charges he faced; (6) the record did not support his claim that MM's mother could have impeached MM with evidence that MM had made false allegations against two other people; and (7) that he was not denied his right to a meaningful appeal.[3]

analysis

I. Effective Assistance of Counsel

Rivera contends that the trial court mistakenly denied this claim in reasoning that this court had disposed of the claim in his direct appeal. He cites the trial court's conclusion of law No. 7.1, in which the court observed: "The Court of Appeals has already noted Rivera's claims of ineffective assistance of counsel." Clerk's Papers at 36. He then compares this statement to what this court stated in Rivera's direct appeal: "The record before this court does not support any of these allegations [of deficient counsel]. If a defendant wishes to bring a claim of ineffective assistance based on matters that are outside the appellate record, he must do so by means of a personal restraint petition." *Rivera*, 2007 WL 1893678, at *4. He thus asks that we remand for the trial court to consider his claim.

Rivera misconstrues the trial court's actions. In a 21 page decision, the trial court meticulously considered each of Rivera's reasons in support of his motion to vacate. The trial

[3] Rivera raised claims 2-7 pro se in his SAG.

court found no merit to any and thus Rivera's claim of ineffective assistance founded on these same arguments necessarily failed. Remand would be fruitless and a waste of judicial resources.

II. Statement of Additional Grounds for Review

Rivera's claims in his SAG rely on two police reports that he obtained after this court decided his appeal. These are Lacey police short report number 05-4033 and Lacey police officer report number 2005-4458. Report 05-4033, though heavily redacted, appears to be a report that MM's mother made against MM's father involving allegations of sexual molestation, revenge killing, and a child pornography ring. Report 2005-4458 reports MM's mother's arrest after she made false allegations of burglary and assault against Rivera and reports that MM's mother possessed methamphetamine. Additionally, Rivera has presented the reporting officer's notes during his interview with Rivera after Rivera's arrest. He presents these notes to demonstrate that he explained to the reporting officer that MM's mother had a history of false allegations and that the State knew about them.

Rivera complains that the prosecutor fraudulently concealed this evidence, that trial counsel provided ineffective representation for not investigating the allegations, and that the evidence was admissible to challenge MM's credibility.

First, we note that Rivera does not present "newly-discovered" evidence as that phrase is used in justifying a reexamination of the evidence introduced at trial. Courts have developed a rigorous test to ensure that a jury's verdict be the ultimate resolution of the facts and decision in the case. It is for this reason, in order

> [t]o obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or

impeaching.

State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). The proponent must show that all five factors are present to justify a new trial. *Macon*, 128 Wn.2d at 800.

Rivera fails to make this necessary showing to obtain relief. First, it is undisputed that the police reports were contemporaneous to his arrest, he knew about them, counsel for both parties knew about them, and the court was aware of them. While they may not have seen the actual police reports, all parties were aware of the general nature and factual allegations in them. Second, the evidence was available before trial and would have, with due diligence, been available. Third, Rivera fails to show that this evidence would have changed the trial outcome. Fourth, these reports primarily attack the credibility of MM's mother, who did not testify at trial and hence it is unlikely they were even admissible for any legitimate purpose. And finally, the only purpose for using this evidence would be to attack MM's mother's credibility. It is highly unlikely that any trial court would have allowed the defense to introduce this evidence to attack MM's credibility when they involved matters unrelated to those charged and contained inadmissible evidence. We reiterate that Rivera has the burden of showing that his evidence is admissible under the rules of evidence and he has failed to do so.

Rivera complains that the State fraudulently concealed this evidence in a number of ways. The first being when the reporting officer failed to include this exculpatory evidence in his police report. The second being when the prosecutor failed to include this information in the charging document. The third being when the State induced the court to keep MM's mother from testifying in order to keep this evidence from the jury. And the fourth being defense counsel's agreement with the trial court's ruling in limine.

Contrary to these assertions, the record before us shows no fraud, complicity, bad faith, or misconduct that would justify granting Rivera a new trial. What is apparent from the record is that MM's mother made false allegations and used illegal substances, which would not have helped either the State prove its case or Rivera establish a defense because she would not have been a credible witness. It is noteworthy that neither side in this case listed her as a witness. And while this court does not have the benefit the prosecution and defense have of evaluating a prospective witness face to face, it is apparent that no one wanted this woman to testify. Rivera simply fails to show fraud or any resulting prejudice.

Rivera's claim of ineffective assistance of counsel fails because the bases in support of his claim lack merit. The trial court did not abuse its discretion in denying Rivera's CrR 7.8 motion.

We affirm.

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.

Penoyar, C.J.

We concur:

Armstrong, J.

Worswick, J.