COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27724-1-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
CHRISTOPHER JACK REID,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Christopher Reid appeals his Whitman County Superior Court convictions for second degree rape, first degree burglary, and two counts of residential burglary. He primarily argues that the trial court erred by not granting a continuance and that his counsel erred in several instances, resulting in ineffective assistance. We conclude that the trial court did not abuse its discretion in denying the continuance and that Mr. Reid has not shown that his attorney performed so deficiently that he was denied his right to counsel. The convictions are affirmed.

FACTS

Mr. Reid formerly worked in the adult film industry and visited Pullman on September 12, 2007, after completing filming of a movie in Seattle. Mr. Reid's screen name was "Jack Venice." Reid introduced himself by that name to people at Munchies, a Pullman restaurant. Reid told Colin Tuggle that he was a "porn star" and asked Tuggle if he knew any women interested in making a movie with him. Tuggle did not. Tuggle also noticed that Venice had a tattoo on the back of his neck, and he also claimed to have bullet tattoos around his leg. Tuggle later identified Exhibit 6, a picture of Mr. Reid's neck tattoo, as the same tattoo that Venice had.

Colin Davis and Kyle Schott were friends. Around 9 or 10 p.m. they went to Stubblefield's, a Pullman bar. Schott was wearing a bandage on his arm that evening. At the bar the two met a man named Jack Venice.[1] Other patrons of the bar recognized Venice from his film career; he agreed that he was the person in the films.

After an hour or two at Stubblefield's, Davis, Schott, and Reid (Venice) went to Valhalla, a nearby bar. They stayed there for about 45 minutes before returning to Stubblefield's. Davis went home to go to bed; the other two entered the bar. Maria Scherrer testified that she served several drinks to Mr. Reid, who was with a man with a bandage on his arm. Mr. Reid made several sexually offensive remarks to her.

[1] Davis identified Reid in court as the man he knew as Venice.

The two men left the bar at closing, which Ms. Scherrer referred to as "1:45 which is two o'clock bar time." Mr. Reid wanted to find a party; the two men found one at an apartment down the hill from the bar. They were admitted to the party and joined two men in a drinking game called "beer pong." Reid told the men that he was in the adult film industry and asked if they knew any women who might want to make movies with him. Reid offered to pay for use of the apartment's bedroom for filming. The men did not believe Reid, so he used a computer to access Internet sites displaying his work. He then dropped his pants to show the partygoers his bullet tattoos. They asked him to leave.

Reid and Schott left and went looking for another party. They arrived first at the Pi Beta Phi sorority house. Schott believed Reid was looking for women to have sex with. Reid climbed up on a porch and entered the building through a window. He later threw pillows and other items out of a third floor window; Schott threw them back up to the third floor. Reid came out of the front door of the house.

The two men moved down the street to the Delta Gamma sorority house. Schott boosted Reid through a window of the house; Reid then let Schott in through the front door. There they each started drinking soft drinks found in the building. A woman arrived and told the two to leave. The men left and tried punching numbers on the keypad for the Alpha Gamma Rho fraternity across the street. Two men came to the door

and told the pair to leave. They again departed.

The two next came upon the Kappa Alpha Theta sorority. Mr. Reid again entered the building through a window and then let Mr. Schott in through the front door. The two used a computer in a second floor study lounge before moving up to the third floor. There they saw a light from a television set coming from one of the rooms. They entered and saw a woman, K.E., asleep on the floor.

Reid told Schott that this was what he had been looking for and that he would "hook up" with the woman. Reid pulled his pants down to his knees and began caressing K.E. with his hand. He asked Schott for a condom; Schott provided it. Schott began touching K.E.'s vagina and eventually penetrated her with his finger. Reid placed the condom on and rubbed his penis against K.E.'s vagina.

K.E. woke to the sound of a candy wrapper being opened and realized that she was being touched in several places. She turned and saw a face. She identified Mr. Reid at trial as the person she saw. She heard him say something to the effect of, "go, she's awake." The two men fled the building.[2]

Charges were promptly filed against both men. Mr. Schott reached a plea agreement with prosecutors and entered guilty pleas to charges of third degree rape and

[2] Schott testified that he saw Reid run from the room and followed him. Reid then told Schott that the woman had awakened.

second degree burglary. He agreed to testify against Mr. Reid.

Mr. Reid was charged with second degree rape, first degree burglary, two counts of residential burglary, and one count of attempted second degree burglary. He was arraigned and the trial date was originally scheduled for November 26, 2007. A series of continuances and rescheduled trial dates followed: March 10, 2008; May 19, 2008; September 15, 2008; October 20, 2008.[3]

Defense counsel sought to extend the trial date one more time. The court heard the motion telephonically on October 10. Defense counsel advised the court that he was in trial in Spokane County and that delays in that proceeding would keep him in trial through October 16. He needed to meet with his client and interview the victim, but the other witness interviews had been completed. He also advised the court that if ordered to trial on the 20th, "I could, I do have concerns about whether I would be fully prepared but I could do it. I would feel very uncomfortable about it." Report of Proceedings (Oct. 10, 2008) 6.

The court reviewed the record and determined that while several of the previous continuances had been for evidence analysis, one of the prior continuances had been granted at defense request. The court noted that significant efforts had been made to re-

[3] This court has not been provided with the trial scheduling/continuance orders or the transcripts of those hearings (if any). This record is found in the trial court's comments while denying a continuance of the October 20 setting.

set the court's calendar to accommodate the October 20 trial setting. In light of these circumstances, it was "not reasonable" to continue the case again because there had been adequate time to prepare.

Trial started October 20 as scheduled without a further request for a continuance. K.E. identified Mr. Reid as the assailant in the courtroom. At a side bar, defense counsel indicated he would cross examine her about a photo montage in which she had identified Mr. Reid with only modest confidence. The prosecutor then elected to present the montage during K.E.'s testimony. Defense counsel did cross examine her about the uncertainty of her montage identification.[4] Later in the trial, the court commented that the montage was suggestive in the manner in which it permitted K.E. to rule out Mr. Davis. The court also commented that the montage did not play a role in K.E.'s in-court identification of Mr. Reid.

DNA testing of the condom wrapper established that about one-third of the population could have contributed the DNA found there. Mr. Reid, Mr. Schott, and K.E. were all potential contributors. The testimony on this topic was admitted without objection.

Defense counsel argued the case on the theory that Schott was the rapist and that he implicated Reid for his own benefit; Colin Davis likely was Schott's accomplice.

[4] K.E. put her confidence in the identification as five or six out of ten.

Counsel also argued that K.E.'s identification was weak and effected by the suggestive nature of the montage as well as the constant publicity concerning Mr. Reid's occupation. As a "porn star" who gets paid to have sex with women, he did not "need" to rape anyone.

The jury acquitted Mr. Reid on the attempted burglary charge involving the fraternity house, but found him guilty on all other counts. The trial court imposed a low-end minimum sentence. Mr. Reid timely appealed to this court.

ANALYSIS

The issues in this appeal include whether the trial court erred by not granting the continuance and whether counsel was ineffective.[5] Mr. Reid also challenges the sufficiency of the evidence to support the convictions. We address each challenge in turn.

Continuance

A trial court's decision to grant or deny a continuance of trial is reviewed for manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985); *State v. Early*, 70 Wn. App. 452, 458, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). When a case has been previously continued, an even stronger showing in support of the subsequent request is necessary.

[5] Mr. Reid has also filed a *pro se* Statement of Additional Grounds (SAG) which we will address in the course of the ineffective assistance analysis.

State v. Barnes, 58 Wn. App. 465, 471, 794 P.2d 52 (1990), *aff'd*, 117 Wn.2d 701, 818 P.2d 1088 (1991). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court certainly had tenable grounds for denying the request. There had been four prior continuances, and the October 20 setting had been entered after great efforts to rearrange the court's calendar and assure a date that all counsel could meet. While the unexpected delays in the Spokane County case understandably cut into his preparation time, counsel still had four days to meet with his client and interview the victim. All other interviews were complete. Most tellingly, defense counsel did not renew his request for a continuance on the 20th nor claim that any preparation work remained.

The stronger showing needed in support of yet another continuance was not made. Counsel agreed that he would be ready, but simply would be "uncomfortable" with his preparation. In the absence of some showing of prejudice to the defense, the trial court did not abuse its discretion by denying yet another continuance of this trial. *Early*; *Barnes*; *State v. Honton*, 85 Wn. App. 415, 423, 932 P.2d 1276, *review denied*, 133 Wn.2d 1011 (1997); *State v. Roth*, 75 Wn. App. 808, 825-826, 881 P.2d 268 (1994),

review denied, 126 Wn.2d 1016 (1995).

The trial court did not err in denying the continuance request.

Effective Assistance of Counsel

Mr. Reid argues that his defense attorney did not provide effective assistance of counsel as required by the Sixth Amendment. Much of the allegedly defective behavior involved tactical choices left to the discretion of counsel.

The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Comment on Death Penalty. Mr. Reid first argues that his counsel erred in not objecting when the court informed jurors that the case did not involve the death penalty. This issue arose during voir dire when the court asked:

> Is there anyone here that can't assure the court that they'll be able to follow the court's instructions if they have a personal opinion or belief that differs from the law?
>
> Okay. Does this concept give anyone any concern[?]
>
> *And we have some touchy issues that aren't involved in this case, so I'll throw those out. Abortion, and gun control, and death penalty.* And sometimes people can

have strong personal or religious beliefs that are different than what -- what's on the books. But you'd be required -- The jury doesn't get to decide what the law is. And you have to follow the court's instructions. Is there anyone that has any concern or anyone that can't assure me they'll be able to do that?

RP 71 (emphasis added). Defense counsel did not object to these statements or seek to have the court clarify them.

The Washington Supreme Court has determined that it is improper for a trial judge to tell a jury being selected for a murder trial that the case does not involve the death penalty. *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001). Defense counsel is deficient for failing to object to such an instruction. *Id.* at 847. However, if the error does not affect the outcome of the case, the prejudice prong of the *Strickland* test is not satisfied. *Id.* at 849.

The reason that telling a jury the death penalty is not involved is error arises from the fear that jurors may take their case less seriously. *Id.* at 846-847. We do not believe that problem is implicated in this case. First, this was not a murder case and there is no reason to think that the jury would have construed the statement as denigrating its responsibility to give careful consideration to this case. More importantly, the context of the court's statement here is totally different. Rather than instruct that this was not a capital case, the court simply mentioned the death penalty as one of three areas, none of which were at issue, where some jurors might have trouble following the law instead of

their own consciences. Unlike a murder trial, use of the capital punishment example in this context simply did not present the possibility that the jury might disregard its obligations to give serious consideration of the case. It instead was used to help identify jurors who might disregard the law.

Thus, it is unclear that counsel erred at all. We need not decide that, however, because even if this was error, it was not prejudicial to the defense case. While Mr. Reid argues that the case against him was weak due to identification difficulties, we do not agree. More to the point, the question presented at this trial was the identity of the rapist. Commentary that this was not a capital case simply did not impact that issue. The court's statements did not suggest to the jury that it should not give careful consideration to whether or not the evidence established that Mr. Reid was the rapist.

Failure to object to the court's comment that this was not a death penalty case did not change the outcome of this case. Counsel did not fail his client.

Juror No. 9. Appellant next contends that his counsel erred by not striking juror 9, a clergyman who had strong personal feelings against pornography and adult films. The juror also had been falsely accused of sexual assault. Neither party challenged the juror for cause. Neither party used all of its peremptory challenges.

The juror stated that he could set aside his personal feelings and fairly try the case.

Thus, it is doubtful that a challenge for cause would have succeeded. The juror's background as a person who had falsely been accused of sexual assault likely resonated with the defense since it was the same theme being used by Mr. Reid. He, too, claimed to be wrongly accused. Under these circumstances, it is understandable that the defense would not challenge juror 9. This decision appears to be a classical tactical decision that is immune from challenge under *Strickland.*

Accepting juror 9 was a tactical choice that cannot be a basis for finding that counsel somehow erred.

Photo Montage and Identification. Mr. Reid next challenges counsel's decision to permit the photo montage to be introduced into evidence and failing to seek exclusion of K.E.'s in-court[6] and out-of-court identification of him. These, too, were clear tactical choices.

The prosecutor initially decided not to seek admission of the montage. After the victim's strong in-court identification of Mr. Reid, defense counsel decided that he would seek to use the montage. The prosecutor then admitted the montage without objection and examined K.E. about her identification. Defense counsel cross examined K.E. about it at some length. He then used that testimony in closing argument to impeach her in-court identification, stressing that her recent identification was the result of a year's worth

[6] Argued by Mr. Reid in his SAG.

of publicity about Mr. Reid and contrasting it with the uncertainty of her September 2007 identification. This approach, along with attacking Schott's motivation, was the primary thrust of the defense closing argument.

The decision to use the montage and the out-of court identification was clearly a tactical choice. It does not establish any failure by defense counsel. *Strickland.*

Appellant also argues that counsel should have sought to exclude K.E.'s in-court identification as the fruit of a suggestive montage. However, the evidence does not support the argument. As noted, K.E.'s identification from the montage was of modest strength. At trial, K.E. explained that her identification was based on seeing Mr. Reid's face in front of her rather than on a memory of the photograph, which she did not see again until after the in-court identification. Any motion to suppress would not have been likely to succeed.

Any error here would also have been harmless. All of the identification testimony at trial pointed at Reid, not Davis, as Schott's late evening companion. Schott's testimony figured prominently at trial as well. There was no testimony suggesting that K.E. misidentified Mr. Reid as her assailant.

Neither prong of the *Strickland* standard is met in this instance. Mr. Reid has not shown that his trial counsel committed error that prejudiced him in the handling of the

identification testimony.

DNA Evidence. Appellant next contends that counsel erred by not seeking to exclude the DNA evidence. He contends that the results were not definitive enough to have been admitted.

The evidence was certainly relevant. Because the test results did not exclude Reid, Schott, or K.E. as contributors, it did tend to support the State's theory of the case. It was therefore relevant evidence. ER 401. Relevant evidence is admissible. ER 402. Any motion to exclude the evidence would undoubtedly have been denied. Questions about the weight to be given DNA evidence are factual matters for the jury to consider rather than being a basis for exclusion. *State v. Copeland*, 130 Wn.2d 244, 270-277, 922 P.2d 1304 (1996); *State v. Kalakosky*, 121 Wn.2d 525, 540-543, 852 P.2d 1064 (1993); *State v. Cauthron*, 120 Wn.2d 879, 889-891, 898-899, 846 P.2d 502 (1993).

There was no basis for excluding the DNA evidence. Counsel did not err when he declined to challenge the testimony.

Prior Acts. Finally,[7] Mr. Reid argues that his counsel erred by not objecting to the testimony of Mr. Tuggle and Ms. Scherrer, and by not challenging the frequent references to Mr. Reid's occupation ("porn star").[8] This evidence, too, was clearly admissible on

[7] Appellant also argues that the accumulation of counsel's errors established ineffective assistance. Since we do not believe any errors occurred, let alone an accumulation of them, we do not separately address this argument.

the question of identity. Counsel did not err by failing to challenge it.

The testimony from Mr. Tuggle established Mr. Reid's presence in Pullman and used Mr. Reid's own description of himself as "Jack Venice" and a "porn star." He also showed a distinctive neck tattoo. Mr. Reid (Venice) also told Tuggle he was seeking women to star with him in adult movies. All of this testimony was relevant to showing that Mr. Reid was in Pullman's college hill area and what one of his motivations was for being there.

Similar testimony was elicited from Ms. Scherrer, who also testified about Reid's comments about sexual activities. Her testimony was important to tying Reid to Schott (and only Schott) in the early morning (1:45 a.m.) shortly before the charged offenses occurred. As a bartender at a college area tavern, Scherrer's identification of a young man who appeared once in her bar a year earlier would undoubtedly be suspect if there was not a reason why she remembered him. Reid's obnoxious behavior and unusual profession undoubtedly played a role in reinforcing her memories of his single visit to her bar. Thus, evidence of Mr. Reid's behavior in the bar that night was admissible to explain Scherrer's ability to identify him.

The testimony from both witnesses was admissible on the critical issue of identity. Defense counsel understandably did not waste time making futile objections to the

[8] The latter claim is raised in the SAG.

testimony. The use of the term "porn star" to identify Mr. Reid presents a similar issue. He regularly used that description in his interactions with Pullman residents in the bars and apartments he visited. That description was important to their ability to identify him. Counsel can hardly be faulted for not objecting to admissible evidence that came from his client's own mouth. There simply was no basis for exclusion.

While perhaps use of the phrase "porn star" was overplayed to a degree, it did not harm the defense. Cumulative use of admissible evidence is not reversible error. *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970). The evidence also allowed counsel to make his arguments that Mr. Reid's profession precluded him being a rapist and that Schott (and others) were ganging up on the out-of-towner to blame him for the crime. In other words, defense counsel also had a good tactical reason not to object to the evidence.

Mr. Reid needed to show both that his counsel failed to perform to professional standards and that counsel's defective performance prejudiced his case. He has established neither. Accordingly, he has not shown that his counsel provided ineffective assistance contrary to the requirements of the Sixth Amendment.

Sufficiency of the Evidence

Mr. Reid also argues that the evidence did not support the convictions. He argues that the rape and first degree burglary fall for failure to prove he was present at the scene. He argues that the two residential burglary counts failed to establish that he intended to commit any crime inside the two sorority houses. Properly viewed, the evidence was sufficient.

Sufficiency of the evidence challenges are reviewed according to well-settled standards. Appellate courts review to see if there was evidence from which the trier-of-fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

In view of the specific nature of the alleged proof deficiencies, we will only address the evidence relevant to the challenges. Appellant argues that he was not present at the Kappa Alpha Theta house where the rape and first degree burglary counts occurred. To the contrary, both K.E. and Mr. Schott testified that Mr. Reid was not only present, he was the perpetrator. Viewed most favorably to the State, this evidence certainly permitted the jury to conclude that Mr. Reid committed both offenses.

With respect to the two residential burglaries, Mr. Reid challenges the sufficiency of the evidence to support the element that he was present unlawfully "with intent to commit a crime" in the residences. RCW 9A.52.025(1). Viewing the evidence in a light most favorable to the prosecution, the evidence amply supported the jury's verdicts. First, Mr. Schott testified that Mr. Reid was looking for women to have sex with him. As his subsequent conduct demonstrated, he was not looking for a willing partner. This evidence alone would establish his intent in breaking into the two houses.

His conduct within each house, however, also established the element. At the Pi Beta Phi sorority he threw property out of the window. This established the crime of theft. Similarly, at the Delta Gamma house, two soft drinks were taken and partially consumed. Once again, this was a theft. In both instances, this evidence showed that the defendant did in fact commit a crime within each building. The evidence permitted the jury to find this challenged element in both of the residential burglary counts.

The evidence was sufficient for the jury to find each contested element of the four crimes. The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.