

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

D.B.,¹

Appellant.

No. 38252-1-II

UNPUBLISHED OPINION

Bridgewater, J.—D.B. appeals his Thurston County conviction of indecent liberties. He contends that trial counsel did not effectively represent him because counsel did not move to dismiss at the end of the State’s case in chief. He asserts that at that point, there was insufficient evidence to prove that he and K.B. were not married. We affirm.²

FACTS

D.B. and victim, K.B., had lived near each other for seven years. They were good friends, and D.B. often spent time at K.B.’s house. On February 20, 2008, he and K.B. were both home from school, and he emailed her to ask if he could come over. She agreed although she was watching her two-year-old brother and her parents normally did not allow anybody over in those

¹ Under RAP 3.4, this court changes the title of the case to the juvenile’s initials. The ruling uses initials for the juvenile to protect his rights to confidentiality.

² A commissioner of this court initially considered this matter pursuant to RAP 18.14 and referred it to a panel of judges.

circumstances.

After D.B. arrived, they talked, listened to music, and watched television. At some point, D.B. was sitting on a recliner in the living room. When K.B. moved past him to look out of the window, he grabbed her hips and pulled her onto his lap. She struggled to get off of him, and fell forward onto the floor. D.B. pushed her down, pinned her hands to the floor, and positioned himself on top of her between her legs. He said they should have sex. He used his teeth to pull her shirt down, exposing her breasts, and left bite marks on her chest, and a hickey on her neck.

K.B. testified that she struggled the entire time, but was unable to fend him off. He released her only after they both heard neighbors pulling into the driveway. He jumped away from her, but then came back, picked her up, put her on the kitchen counter, and began kissing her. When she kneed him in the groin, he stopped his advances and left the house. As he was leaving, he told K.B. to log onto MySpace. He emailed her an apology and told her to tell her boyfriend that she had gotten into a fight.

D.B. testified that he did not force K.B., that she was a willing participant. He claimed that he was only trying to bite her clothes and bit her chest accidentally.

The prosecutor did not ask any witness whether D.B. and K.B. were married. During the defense phase of the trial, however, the court asked K.B. that question, and she answered in the negative.

ANALYSIS

Under Washington law, D.B. is guilty of indecent liberties if he knowingly caused K.B., who was not his spouse, to have sexual contact with him by forcible compulsion. D.B. argues

that he could not have been convicted on the evidence before the court at the end of the State's case, and counsel's performance was deficient because he did not move to dismiss when the state rested.³

A criminal defendant claiming ineffective assistance of counsel must prove that (1) his attorney's performance fell below an objective standard of reasonableness considering all of the circumstances, and (2) the attorney's deficient performance prejudiced the defense. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). As to the first prong, the court's review is highly deferential, and analysis begins with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689. A defendant can establish the second prong by showing a reasonable probability that but for counsel's errors, the result would have been different. *Thomas*, 109 Wn.2d at 226.

The non-marriage of a sexual offender and the victim, like other elements of the crime, can be proven by circumstantial evidence. *See State v. Rhoads*, 101 Wn.2d 529, 532, 681 P.2d 841 (1984). Here there was overwhelming circumstantial evidence that D.B. and K.B. were not married. At the time of the incident, D.B. was 14 years old, and K.B. was 15, and they could not legally marry in Washington, where they had both lived for at least seven years.⁴ When K.B. was asked about her relationship with D.B., she testified that they were neighborhood friends, and she

³ In connection with this argument, D.B. assigns error to Finding of Fact 8 and Conclusion of Law 3. As discussed *infra*, there is substantial evidence to support the determination that the two juveniles were not married.

⁴ *See* RCW 26.04.010.

thought of him as a brother. In addition, there was another boy who was her boyfriend. There is no reasonable probability that the trial court would have dismissed the case if D.B.'s counsel had brought the motion when the State rested.⁵ D.B. has established neither deficient performance, nor prejudice.

Affirmed.

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.

Bridgewater, J.

We concur:

Armstrong, J.

Van Deren, C.J.

⁵ The trial court did mention that the state committed an oversight in not asking about marriage, but it specifically noted that the evidence presented in the State's case was enough to permit a logical inference that D.B. and K.B. were not married.