

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 62305-2-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
JAMES JAY LEWIS,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	FILED: November 16, 2009

Leach, J. — James Lewis appeals his conviction for second degree rape. He claims that his counsel was ineffective for failing to object to testimony from the victim and her mother about how the alleged rape affected the victim. Lewis has not rebutted the presumption that defense counsel’s failure to object to this testimony was a legitimate trial tactic, and he has not shown that the lack of objection prejudiced him. Therefore, we affirm his conviction.

Background

C.D. first met Lewis at an auto parts store in Renton where C.D. worked. The two began speaking over the telephone but never spent time alone together outside of C.D.’s workplace. On March 29, 2007, C.D. agreed to meet Lewis after work to get lunch. C.D. told her mother about her plans, indicating she

would be home within a couple of hours.

Lewis and C.D. met at a gas station, and Lewis appeared to be upset that C.D. was late. He indicated to C.D. that he wanted to stop by his apartment in order to change his clothes. However, the apartment actually belonged to Lewis's friend, Ronald Hoyt, to whom Lewis sporadically paid rent in exchange for sleeping in the living room. Ignoring Hoyt's rule that no one could be in the apartment in his absence, Lewis persuaded C.D. to enter, claiming that other people were already inside the apartment.

Almost immediately after entering the apartment with Lewis, C.D. realized that they were alone. Lewis went into the bedroom and invited C.D. to join him; she refused. C.D. attempted to leave the apartment, but Lewis grabbed her by the arm, preventing her from leaving. Lewis began groping C.D., who protested and tried to pull away from his grasp. Lewis continued to forcefully restrain C.D., eventually pulling her into the bedroom. C.D. kept verbally protesting and struggling to free herself while Lewis pushed her onto the bed, lay on top of her, and pinned her arms behind her back. Lewis began to kiss her back, fondle her body, and lift her shirt up to unhook her bra. When C.D. continued to struggle, Lewis aggressively demanded that she "be quiet."

C.D. cried as Lewis undressed her, unbuckled his pants, and attempted to put his penis in her anus. Unable to do so, Lewis then penetrated C.D.'s vagina, causing her pain. Lewis eventually stopped after C.D. pleaded with him and

insisted she needed to pick up her son. Lewis allowed C.D. to leave but required her to leave her bra at the apartment to ensure her return.

C.D. drove directly to the barbershop where her godfather, Dexter, worked. His colleague, Abe Winston, saw C.D. enter the shop crying. He heard her say that she had been raped. C.D. called her best friend and her mother from the barbershop. Upon her arrival, C.D.'s mother called the police.

When officers from the Seattle Police Department arrived, C.D. described the incident to them. The officers went to the apartment, spoke to Lewis, obtained C.D.'s bra from the bedroom, and collected other evidence for forensic testing. Lewis's semen was found on bed sheets recovered from the apartment, while C.D.'s DNA (deoxyribonucleic acid) was not.

During direct examination at trial, both C.D. and her mother, Berthetta Robinson, testified to C.D.'s condition after the rape. Robinson testified as follows:

Q: I want to talk to you about after, kind of days—the days after this happened. Did [C.D.] immediately go back to work the next day?

A: [C.D.] tried to go back to work and realized she couldn't. [C.D.] was just, like, exhausted. She wasn't sleeping. She had nightmares. It was hard focusing for her. She couldn't get what happened to her out of her mind.

Q: Did this experience that you have just described about inability to sleep and the other experiences that you saw in your daughter, did this just last for a week, for longer?

A: No. [C.D.] still is experiencing this. Different forms—she

doesn't shake as much physically, but now she, like, chain-smokes, and she wasn't like a big smoker before, but she chain-smokes. She doesn't sleep. She doesn't get six hours or four hours of sleep. There is some days she can go two or three days in a row and not sleep.

Later the State asked C.D. how the rape affected her generally. She testified:

I have never been the same. I have isolated myself and I can't keep a job. I have gained weight due to stress, and I have gone through so many emotions up and down, I don't know what to do sometimes. It seems like everything, like I have "raped" printed across my shirt.

I can't do anything. I can't take care of my son and I don't go anywhere. I don't go to the movies or the mall or get my hair done. I don't drive the car. I just don't want anybody to talk to me. I have my brother, mom and my friends do all the stuff for me. I try to do stuff and I just can't.

I have problems sleeping. I have nightmares that I can't talk or that there is his friend and he said he would hurt me and tell the friends and I try to leave it alone.

Lewis did not object during either witness's testimony. The State called numerous other witnesses to testify about their interactions with C.D. on March 29, 2007. Abe Winston testified as noted above. Jewleon Bruce testified that C.D. called him on the phone en route to the barbershop. C.D. was crying and sounded very angry and emotional when she told Bruce that she was raped.

After the police arrived, C.D. spoke with Officer Denise Bouldin, who testified that C.D. appeared upset and that she had difficulty talking due to how hard she was crying. Officer Shawn Benshoof testified that C.D. appeared upset and was crying when he arrived. Officer Benshoof stated that C.D. told him that Lewis attempted anal sex, punched her several times, and then forced vaginal

intercourse. C.D. also told Officer Benshoof about her bra being left inside the apartment. Officer Alex Lee Chapackdee testified that he found C.D.'s purple bra inside the bedroom in the apartment where she said she had been raped.

Bethel Spagnolo was a social worker who met with C.D. at Harborview Medical Center after the incident. Spagnolo testified that C.D. stated she was raped, was tearful during their interview, and that she was scared of seeing Lewis again. Melissa Kammenga, a sexual assault nurse examiner at Harborview Medical Center, performed a physical examination of C.D. and testified that C.D. claimed to have been sexually assaulted and was crying throughout the interview; she was scared of seeing Lewis again, being pregnant, or having contracted a sexually transmitted disease. Kammenga also noted that C.D.'s outer labia were tender and detected abrasions to other parts of her vagina. In addition, C.D. suffered from light-headedness, difficulty breathing, abdominal pain, a sore neck, and an abrasion on her right inner knee.

In total, the State called 14 witnesses. Lewis called no witnesses and did not testify at trial.

During closing, the State rhetorically asked, "Do you doubt for a moment that this young woman, that she would put herself through this if it weren't true?"

Lewis's counsel responded during his closing:

Since then [C.D.] has had the psychological issues. The social worker and her own mother work in the rape relief field. She has a psychological background and she knows what someone who has

been raped experiences during the months following that, and so we have got still just one source telling us, not only was it rape, but I tried to go to work and I quit my job and I can barely take care of my son, my mom has to do it and I'm having nightmares. We don't have corroboration of that.

Generally, the State argued that C.D.'s testimony was truthful and proved that she was traumatically raped. Lewis argued that C.D.'s statements were not corroborated and that her mother's testimony might have been exaggerated. Lewis also suggested that the sexual encounter might not have occurred at all, and if it did, it was consensual.

Analysis

Lewis argues that his trial counsel provided ineffective assistance of counsel by failing to object to testimony about how the rape affected C.D. He claims this testimony was irrelevant and prejudicial "victim impact" evidence that likely affected the outcome of the trial.

When reviewing a claim of ineffective assistance, we start with the strong presumption that counsel's representation was effective.¹ To demonstrate ineffective assistance of counsel, Lewis must satisfy both prongs of a two-prong test. He must show (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced him.² We need not address both prongs if the defendant makes an insufficient showing on one prong.³

The defendant establishes deficient performance if there are no

¹ State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

² McFarland, 127 Wn.2d at 334-35.

³ State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

“legitimate strategic or tactical reasons supporting the challenged conduct.”⁴ Lewis bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices.⁵ His attorney's conduct must have fallen below an objective standard of reasonableness considering all the circumstances.⁶ Where a claim of deficiency rests on trial counsel's failure to raise an objection to admission of evidence, a defendant must further show that an objection would likely have been sustained.⁷

Lewis does not satisfy either of these prongs. Under the first prong, Lewis must establish there were no legitimate strategic or tactical reasons behind his attorney's choices.⁸ Lewis fails to do so. Defense counsel's decision not to object to the challenged testimony may have been a tactical one. The testimony by C.D. and her mother about the impact of the alleged rape was brief, and counsel may have refrained from objecting to avoid emphasizing their testimony.⁹ He also may have wished to use the complete absence of corroborating evidence to attack their testimony as a fabrication and did so.

The fact that defense counsel mentioned the victim impact testimony in closing does not undermine a strategy to not draw attention to it at the time it

⁴ McFarland, 127 Wn.2d at 336.

⁵ State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

⁶ State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006).

⁷ State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

⁸ Rainey,
107 Wn. App. at 135-36.

⁹ See In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

was presented. The record shows that counsel briefly mentioned it during closing in what he may have considered a necessary response to the State's assertion that the post-rape impact on C.D. was evidence that a rape occurred. Legitimate strategic reasons exist for not drawing the jury's attention to unfavorable evidence when presented while still responding to argument concerning it in closing.

Even if defense counsel had objected to the victim impact testimony at trial, Lewis fails to show that an objection would likely have been sustained. Lay testimony about the emotional or psychological trauma suffered by a complainant after an alleged rape is admissible.¹⁰ Lewis has failed to meet his burden of proof regarding the deficiency prong of the test.

Under the second prong of analysis, Lewis must show that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different."¹¹

Lewis has not shown prejudice. The challenged testimony played a minor role in the prosecution's case. There is no reasonable probability that it changed the result of the trial. The State provided testimony consistent with C.D.'s

¹⁰ See State v. Black, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987) ("We do not imply, of course, that evidence of emotional or psychological trauma suffered by a complainant after an alleged rape is inadmissible in a rape prosecution. The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence.").

¹¹ Hendrickson, 129 Wn.2d at 78.

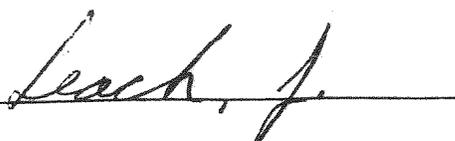
testimony from several people C.D. spoke to directly after the rape. These witnesses uniformly described C.D. as appearing scared, emotional, angry, upset, and crying. Additionally, the findings of her medical examination show otherwise unexplained abrasions and various pains and soreness C.D. experienced. Police found C.D.'s bra inside the apartment where Lewis was living.

On the other hand, Lewis asserted that the sexual encounter might not have occurred at all, and if it did, it was consensual. In support of this defense, Lewis claimed that C.D.'s version of events was uncorroborated. He supported this claim with references to the victim impact testimony and used the lack of corroboration of it to attack C.D.'s credibility. The absence of victim impact testimony from C.D. and her mother would have diminished the strength of this attack without appreciably diminishing the substantial evidence that Lewis raped C.D. Lewis has not shown that excluding the challenged testimony probably would have led to a different outcome.

Conclusion

We affirm Lewis's conviction of second degree rape because Lewis did not receive ineffective assistance when his counsel failed to object to victim impact testimony at trial. He has not shown that defense counsel rendered a deficient performance or that he was prejudiced.

Affirmed.

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WE CONCUR:

Schindler, C.T.

Cox, J.