

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0512

State of New Hampshire

v.

Jason Wilbur

Appeal Pursuant to Rule 7 from Judgment
of the Cheshire County Superior Court

REPLY BRIEF FOR THE DEFENDANT

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(Fifteen minute oral argument)

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QUESTION PRESENTED

1. Whether Wilbur is entitled to a new trial based on counsel's deficient performance and its resultant prejudice.

Issue preserved by Defendant's Motion for a New Trial, App.* 1-31; Affidavit of Alan J. Cronheim, App. 32-46; Objection to Motion for a New Trial, App. 47-60; and Order, Supp. 1-28.

* Citations to the record are as follows:

"App." refers to the Appendix to this brief;

"Supp." refers to the Supplement to this brief;

"NOA" refers to the Notice of Appeal;

"T-I" refers to the transcript of the first day of trial;

"T-II" refers to the transcript of the second day of trial;

"T-III" refers to the transcript of the third day of trial.

"H-I" refers to the transcript of the first day of the hearing on the motion for new trial;

"H-II" refers to the transcript of the second day of the hearing on the motion for new trial.

STATEMENT OF THE CASE AND FACTS

Wilbur relies on the Statements of the Case and Facts in his opening brief.

I. WILBUR IS ENTITLED TO A NEW TRIAL BASED ON HIS COUNSEL'S DEFICIENT PERFORMANCE AND THE RESULTANT PREJUDICE.

Wilbur was not constitutionally entitled to “success” at trial, “perfection in trial tactics,” or representation by “the ideal defense attorney.” SB 15, 18. However, he was entitled to counsel capable of using available information and legal arguments to answer the State’s attacks. He was also entitled to counsel who would not present evidence that bolstered the State’s case.

In these respects, Wilbur’s counsel performed deficiently. She allowed the State to characterize Wilbur’s statements to the police as inculpatory, when the statements were exculpatory. She elicited damaging evidence from her own witness. She let stand the harmful testimony of a social worker when she could have prevented it by objecting. Mid-trial, she reduced the jury’s decision to a question of whether Wilbur or James Dixon caused T.M. to act out sexually. The choice harmed the defense because she failed to elicit evidence of Dixon’s crime, and because she failed to apprehend that, as Dixon’s crime occurred when T.M. was extremely young, that crime could not have caused T.M.’s behavior.

The State characterizes these events as minor or excusable: the failure to impeach or object, surprise testimony from a friendly witness, a passing comment that no one noticed, and a “Catch-22” choice of strategy. In so doing, it understates the level of deficiency and the impact of the errors. Trial counsel was ineffective, and Wilbur is entitled to a new trial.

A. The Statement.

In a sexual assault prosecution, there are often only two conceivable “witnesses,” the alleged victim and the alleged perpetrator. If the jury has any doubt about the claims of the alleged victim, it will turn to evidence tending to corroborate or controvert her claims. A statement by the defendant is critical evidence. If the defendant made such a statement, and a rational juror believes he “did not really deny” the charges, the statement corroborates the allegation of abuse and thus benefits the State’s case.

This jury never heard the truth of what Wilbur said to the police. Just as the State did not quote Wilbur’s statement to the police in its brief, trial counsel did not present to the jury precisely what Wilbur said. This was no simple failure to impeach a witness, or to object during closing. Rather, counsel failed to ensure the jury received a truthful account of Wilbur’s recorded and transcribed statement. That failure led a rational jury to believe Wilbur behaved like a guilty man when confronted with the allegations by T.M. He did not.

Counsel’s failure to present Wilbur’s statements allowed the State to misrepresent them more than happened in Zapata v. Vasquez, 788 F.3d 1106, 1115 (9th Cir. 2015), the State’s chief comparison case. In Zapata, the prosecutor made a passing comment in closing that attributed to the defendant words he did not speak before he shot the victim. Id. at 1115-16. Zapata is like State v. VandeBogart, 139 N.H. 145, 160 (1994), in which the prosecutor, in closing, imagined what a murder victim might be thinking. Each differs

markedly from this case, in which, as the State admits, SB 18, the prosecutor made a calculated effort from the beginning of the trial to distort Wilbur's statements to the police to make them seem to be the statements of a person with a guilty conscience. Based strictly on the evidence presented at trial, which did not include what Wilbur said to the police, the prosecutor's misrepresentations do not seem egregious. In light of Wilbur's statements, which the jury never heard, they were. A lawyer who allows a prosecutor to represent that her client said he would "beat" the charges, and that he did not "really deny" them, when neither statement was true, does not function as counsel the Sixth Amendment and part I, article 15 guarantee.

B. Angela Wilbur.

The State admits that the evidence trial counsel elicited from Angela Wilbur was "harmful," SB 14, and that trial counsel did not "masterfully" rehabilitate the error. SB 20. It argues that counsel cannot be faulted for getting a surprise answer from a witness she had prepared to testify. SB 19-20.

There are two flaws in this argument. First, counsel did not prepare Angela to field the question she was asked. Second, the question was not calculated to produce admissible evidence. The rules of evidence do not permit Angela to testify that she believed her husband or her daughter. Had she said she believed her husband, the prosecutor would have moved to strike the answer, and it would have been stricken. But she said that she believed her daughter, which was more harmful evidence for the jury to consider. Given

Angela's answer, which became one of the pillars of the State's closing argument, counsel's failure to prepare her for the question or anticipate that it could produce no admissible evidence was highly consequential.

C. Jessica Walker.

The State concedes that Walker's opinion "appears to have crossed into the realm of expert testimony," SB 20, but excuses trial counsel's failure to move to strike it because it was a "passing statement." SB 20. Most trial testimony can be characterized as a "passing statement" when measured by the time it took the witness to utter the testimony. A better measure considers the importance of the testimony. This was opinion testimony by a witness whose credentials, training, and experience with child sexual abuse victims the prosecutor stressed. Walker opined that T.M. had been abused for a long time, and the opinion came at a point when the State used the evidence of the long period of abuse to distinguish Dixon from Wilbur. The testimony was inadmissible, it was significant, and it was not evidence that a reasonably competent defense attorney would have allowed to stand.

D. James Dixon.

The parties below characterized the decision to introduce Dixon into the case as a "double-edged sword." SB 21. In one sense, that is fair. However, there are several caveats.

First, a double-edged sword must be handled with care. The record of the ineffective assistance of counsel hearing established that counsel had agreed before trial not to admit the Dixon evidence, and had no strategy for its

use. Second, the State argues that the Dixon evidence was necessary as an alternative explanation of T.M.'s behavior. SB 22. At that point in the trial, however, two passing statements referenced T.M.'s behavior, one of which was that she had accidentally hurt her sister. SB 22. Only after trial counsel moved to introduce the Dixon evidence did much more detail about T.M.'s sexualized behavior, counseling, and DCYF involvement come into the trial. Third, the jury heard that Dixon assaulted T.M. when she was two or three years old. A reasonably competent defense attorney would have known that, and would have apprehended that T.M.'s age and the passage of time made the described symptoms not likely the product of Dixon's conduct. Fourth, the jury never heard what Dixon did. It never heard whether Dixon committed different variants of sexual assault against T.M. over a period of years, which, as Walker said, is the kind of conduct that could have caused T.M.'s later sexualized behavior. A reasonably competent lawyer who believed there was a chance Dixon's crime could have caused T.M.'s conduct would, at a minimum, have known the details of the crime, and assessed the likelihood of a nexus to the sexualized behavior, before choosing to admit it.

This Court rightly defers to the strategic decisions of trial counsel. Here, counsel grabbed a double-edged sword in the middle of trial without appreciating or weighing the consequences. The resultant evidence bolstered the State's case.

E. Prejudice.

With respect to prejudice, Wilbur largely relies on the arguments in his opening brief. He addresses two points in the State's brief.

First, the State argues that Wilbur's acquittal of two charges supports the proposition that any deficiencies in representation were not prejudicial. SB 25. However, after the verdict, the jury told the court and parties that it would have convicted Wilbur of all charges had the State charged penetration of an allegedly blindfolded T.M. by an "object" instead of a "penis." Supp. 59. This statement diminishes what probative force the acquittals might otherwise have had.

Second, the State argues that the evidence of guilt was so overwhelming that any errors were inconsequential. SB 24. This is incorrect. The evidence was legally sufficient because T.M. testified to the elements of the offenses. Otherwise, it was unremarkable, apart from the fact that counsel's errors led the jury to believe that Wilbur made damaging statements to the police, told the jury that his ex-wife believed the allegations, and led the jury to believe that Wilbur must be guilty because Dixon could not reasonably have caused T.M.'s sexualized behavior.

F. Conclusion.

When a defendant faces serious charges, the State typically expends more resources to convict him. He is entitled to counsel who can use readily available principles and information to challenge the State's assertions.

Wilbur's counsel failed to do so, to his prejudice. Based on well-established principles governing effective assistance of counsel, he is entitled to a new trial.

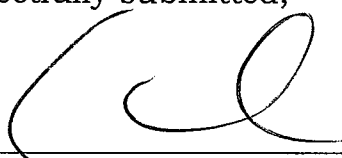
CONCLUSION

WHEREFORE, Mr. Wilbur respectfully request that this Court reverse his convictions and remand his case for a new trial.

Undersigned counsel has requested fifteen minutes of oral argument.

The appealed decision was in writing and is appended to the opening brief.

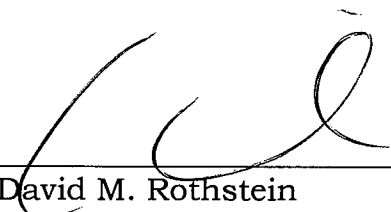
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief have been mailed, postage prepaid, to:

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DATED: May 14, 2018