FILED
March 31, 2016
Court of Appeals
Division III
State of Washington

No. 32514-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

JOHN CAMERON IRA YOUNG,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 13-1-00700-6

BRIEF OF RESPONDENT

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1. Trial counsel was not deficient when he stipulated to the admissibility of his client's voluntary confession.

2. If the Court finds that trial counsel's performance was deficient for stipulating to the admissibility of the defendant's voluntary confession, the defendant cannot show he suffered from actual prejudice.

II. STATEMENT OF FACTS

While the defendant, John Cameron Ira Young, and Joshua Hunt[1] had been acquaintances and had known each other through mutual friends, it was not until a few months leading up to the murder of J.S. (DOB: 06/25/1996) in July of 2013 that the defendant and Joshua Hunt became inseparable, spending every day together. 9RP[2] at 594. Seventeen-year-old J.S. was acquainted with the defendant and Joshua Hunt; however, Joshua Hunt had always suspected that J.S. was working with law enforcement as

[1] Joshua Hunt is frequently referred to as his nickname "RJ" by trial witnesses in the verbatim report of proceedings.

[2] There are eleven volumes Verbatim Report of Proceedings referenced as follows: 1RP- July 5, 2013; 2RP- July 10, 2013, and February 19, 2014; 3RP- July 23, 2013, September 13, 2013, January 2, 2014, February 28, 2014, April 1, 2014, April 11, 2014, April 14, 2014, and April 15, 2014; 4RP- April 14, 2014; 5RP- April 15, 2014; 6RP- April 16, 2014; 7RP- April 18, 2014 a.m.; 8RP- April 18, 2014, p.m.; 9RP- April 21, 2014, April 22, 2014; 10RP- April 23, 2014; 11RP- April 24, 2014, April 25, 2014, and May 2, 2014.

a confidential informant and had expressed that belief to numerous persons. 7RP at 389.

Toward the end of June of 2013, Joshua Hunt purchased a firearm through a cousin of his friend, G.B. (DOB: 02/08/1998). 8RP at 402. G.B., a friend of both Joshua Hunt's and the defendant's, had known Joshua Hunt since the fourth grade and had become close friends with the defendant a few months prior to J.S.'s murder. 7RP at 377, 379. At trial, G.B. admitted to facilitating the sale of a firearm. 8RP at 402. G.B.'s cousin, Emilio Cellarzone, came over to G.B.'s home and showed G.B. a gun that he had. 8RP at 402. G.B. suggested that he knew someone who might want to buy it and contacted Joshua Hunt on or about June 20, 2013, to tell him about the gun. 8RP at 402, 404. Joshua Hunt said that he would come by after work to see the gun. 8RP at 402. Joshua Hunt and Mr. Cellarzone conducted the sale of the gun in Joshua Hunt's car in G.B.'s driveway. 8RP at 405-06. Present in the car were Joshua Hunt, Mr. Cellarzone, G.B., and three other individuals. 8RP at 406. Joshua Hunt and Mr. Cellarzone agreed on a price and completed the sale of the gun. 8RP at 407. Following his purchase of the gun, G.B. heard Joshua Hunt talk about shooting people, including J.S. 7RP at 384; 8RP at 407-08. On one prior occasion, G.B. overheard the defendant and Joshua Hunt talk about killing J.S. 7RP at 384-85; 8RP at 410.

After purchasing the gun, A.M. (DOB: 01/22/1996), J.D. (DOB: 04/16/1996), and C.K. (DOB: 01/09/1996) accompanied the defendant and Joshua Hunt out to a secluded road at night where the defendant, Joshua Hunt, and C.K. shot the gun. 8RP at 527, 535; 9RP at 581, 596. After the group arrived at the secluded area, the defendant and Joshua Hunt asked C.K. to walk away from the vehicle. 9RP at 597. The defendant and Joshua Hunt walked with C.K., pulled out a gun and tried to show her how to use it. 9RP at 598. The defendant tried to show C.K. how to hold and shoot the gun. 9RP at 599-600. A.M. and J.D., who had been sitting in Joshua Hunt's vehicle, thought the sounds they were hearing were fireworks. 8RP at 527-28. As the defendant, Joshua Hunt, and C.K. were walking back to the vehicle, C.K. asked the defendant and Joshua Hunt why they needed a gun. 9RP at 600. The defendant replied that they would get rid of it in a few days. 9RP at 602. Once they arrived back at the vehicle, the defendant and Joshua Hunt showed A.M. a revolver and he quickly realized that the sounds he had heard were gunshots. 8RP at 527-28. A.M. testified that the firearm looked like it belonged to both the defendant and Joshua Hunt. 8RP at 536. After showing the firearm to A.M., the defendant and Joshua Hunt put the gun in the trunk of the vehicle, and they left the area. 8RP at 528-29.

At trial, G.B. testified that he had been with the defendant and

Joshua Hunt on July 3, 2013, which was the day before J.S.'s murder. 7RP at 381. G.B. went to the skate park in Richland around 11:00 a.m., and saw the defendant and Joshua Hunt hanging out. 7RP at 382. The three of them spent most of the day between the skate park and the river. 7RP at 382.

While at the skate park, the defendant, Joshua Hunt, and G.B. were in Joshua's vehicle discussing J.S. 7RP at 383-84; 9RP at 606. G.B. recalled that Joshua Hunt asked the defendant if he knew of a place to go to take J.S., and the defendant responded that he knew of a place where they could go. 7RP at 385-86. The defendant and Joshua Hunt then proceeded to talk about bullets. 7RP at 385. Joshua Hunt told the defendant that he already had five bullets if he wanted to take J.S. to the place that the defendant was referring to. 7RP at 386. Joshua Hunt asked the defendant if they should take a pillow to "muzzle out" the sounds. 7RP at 388. G.B. revealed that on a couple of occasions, Joshua Hunt told G.B. that he wanted to kill J.S., and that on one prior occasion, he overheard Joshua Hunt and the defendant talk about killing J.S. 7RP at 384-85.

On July 3, 2013, at approximately 10:00 p.m., C.K. arrived at the skate park. 9RP at 605. She saw the defendant, Joshua Hunt, and G.B. sitting in RJ's car. 9RP at 605-06. C.K. overheard the defendant tell Joshua Hunt that they should go to Horn Rapids that night. 9RP at 606.

C.K. objected, telling them that they were going to hang out with her that night. 9RP at 606. At this point, G.B. got out of the car, stated "I'm not doing this," and walked home. 9RP at 606. C.K. got into Joshua Hunt's vehicle with Joshua Hunt, the defendant, A.M., and Gerald Hyde. 9RP at 607.

In the early morning hours of July 4, 2013, the defendant, Joshua Hunt, C.K., A.M., and Mr. Hyde arrived at a party at Hayden Menefee's house. 8RP at 435; 9RP at 607. Josiah Brown, a friend of Joshua Hunt and the defendant, showed up at the residence later. 8RP at 516-17. At one point, C.K. left the Menefee house and met her ex-boyfriend, J.S., outside by the Wishy Washy laundromat, which was across the street. 9RP at 611. C.K. and J.S. talked at the Wishy Washy for approximately one hour. 9RP at 611. After they finished talking, C.K. and J.S. walked back to the Menefee house. 9RP at 612. Mr. Brown stated that the defendant's demeanor changed when J.S. showed up at the party. 8RP at 518. At one point during the night, Mr. Brown saw the defendant glare at J.S. 8RP at 518.

At approximately 3:00-4:00 a.m., Mr. Menefee asked the defendant, Joshua Hunt, C.K., J.S., Mr. Brown, A.M. and a couple other individuals to leave his house as alcohol was being served and he found out they were underage. 8RP at 436, 451, 523. Mr. Brown and A.M. asked

Joshua Hunt for a ride to the 7-11 convenience store. 8RP at 518-19. Joshua Hunt refused to give C.K. a ride home, so she began to walk to Roberdeau Street with J.S. 9RP at 612, 614. While Mr. Brown, A.M., Joshua Hunt, and the defendant travelled to 7-11, the defendant said that he found a spot in the desert and wanted to go out and clear his mind. 8RP at 519-20. Joshua Hunt and the defendant dropped Mr. Brown and A.M. off at 7-11. 8RP at 521, 531. At 4:20 a.m., Joshua Hunt called C.K. and told her that he and the defendant would come back and give her and J.S. a ride. 9RP at 614, 633.

After Joshua Hunt and the defendant picked C.K. and J.S. up from Roberdeau Park, they sat in the vehicle for approximately one hour. 9RP at 615. While driving C.K. home, Joshua Hunt and the defendant stopped at a couple of gas stations so that C.K. could try to cash her paycheck. 9RP at 617. C.K. stated that she was unable to cash her check, so Joshua Hunt and the defendant drove her to her apartment complex. 9RP at 617. She testified that Joshua Hunt and the defendant always dropped her off in front of her apartment; however, on this occasion, they dropped her off at the front of the apartment complex. 9RP at 617. C.K. got out of the vehicle, leaving Joshua Hunt, the defendant, and J.S. in the vehicle. 9RP at 617. It was the last time C.K. saw J.S. alive. 9RP at 617.

On July 4, 2013, at approximately 8:00 a.m., the defendant entered

the Conoco gas station in Benton City, Washington. 6RP at 99, 115, 130. The defendant told the clerk, Justin Danner, that he witnessed someone being shot and requested that the clerk call 911. 6RP at 117. While the clerk called 911, the defendant went into the restroom located inside the store. 6RP at 119.

Responding to the 911 call, Lieutenant Chuck Jones arrived at the Conoco and made contact with Mr. Danner. 6RP at 125. Mr. Danner informed Lieutenant Jones that the individual in the bathroom was the one who requested that Mr. Danner call 911. 6RP at 121, 130. Lieutenant Jones approached the defendant near the restroom and asked him what was going on. 6RP at 130. The defendant told Lieutenant Jones that he had witnessed somebody murdered and that the suspect was outside in the parking lot. 6RP at 130. Lieutenant Jones provided Sergeant Danny McCary with the suspect's description. 6RP at 181. The defendant stated that the name of the person who had been shot was "Josh Nap." 6RP at 136-37. The victim was later identified as J.S. 6RP at 137. Shortly thereafter, Detective Scott Runge arrived on the scene. 6RP at 139, 142.

As Detective Runge arrived at the Conoco gas station, he saw a maroon Cadillac style car with two or three deputies surrounding it with their weapons out. 6RP at 143. Detective Runge passed the vehicle and went to meet with Lieutenant Jones in the store. 6RP at 143. As he entered

the store, he noticed Lieutenant Jones standing next to the defendant. 6RP at 145. Detective Runge asked the defendant what had happened, and the defendant stated that his friend, R.J., who was later identified as Joshua Hunt, had shot somebody over by the Richland ORV area. 6RP at 145. Detective Runge asked the defendant where the victim was and asked if he would be willing to show them where he was. 6RP at 146. The defendant agreed. 6RP at 146.

Detective Runge asked the defendant if he wanted something to drink. 6RP at 146. The defendant indicated that he wanted some water. 6RP at 146. As Detective Runge was paying for water at the register, he noticed that deputies had located the suspect, Joshua Hunt, and were bringing him over to the patrol car. 6RP at 146. The defendant ducked his head down and said that he couldn't look at Joshua Hunt right now. 6RP at 146. Joshua Hunt was detained and taken into custody for further questioning. 6RP at 182.

At approximately 8:11 a.m., Detective Runge and Sergeant McCary transported the defendant to the location where J.S. was murdered. 6RP at 147-48. Detective Runge drove with the defendant in the front passenger seat. 6RP at 147. Detective Runge began asking the defendant about the schools he attended, where he lived, what sports he played, and what he planned on doing now that he was out of high school.

6RP at 148. As the defendant made comments, Sergeant McCary wrote them down. 6RP at 185. The defendant stated "I can't believe he killed another human being"; "He didn't say anything. He just pulled it out and shot him"; "Everyone knew about the gun"; and "I feel like I might get in trouble because I was there." 6RP at 186.

The body of J.S. was discovered lying in a sand dune off of Beardsley Road near Horn Rapids in Richland, Washington. 6RP at 191. It was apparent that J.S. had been shot and died of his gunshot wounds. 7RP at 335. He had been shot three times: twice in the head and once in the chest. 7RP at 366; 10RP at 886. He was deceased when law enforcement arrived. 6RP at 192.

As Detective Runge, Sergeant McCary, and the defendant approached the murder scene, Detective Runge parked his vehicle approximately 100 yards from Sergeant Caughey's location. 6RP at 186. Detective Runge allowed the defendant to get out of the vehicle to smoke a cigarette. 6RP at 149. The defendant stated that he had been at a party with Joshua Hunt earlier in the evening and that they had been up all night. 6RP at 150. He revealed that earlier in the evening, he and Joshua Hunt ran into J.S. and his girlfriend. 6RP at 150. After the defendant, Joshua Hunt, and J.S. took J.S.'s girlfriend home, the three of them decided to go to a place off of Beardsley Road to smoke marijuana. 6RP at

150. The defendant stated that J.S. had gotten up and asked, "Now what?" and Joshua Hunt pulled out a pistol and said, "This is now what," and began firing at J.S. 6RP at 150. The defendant claimed that after he saw Joshua Hunt shoot J.S., they left and went to the Benton City area because it was Joshua Hunt's idea to take the shoes and evidence and throw everything into the river. 6RP at 150. Detective Runge then told the defendant that Richland Police detectives would need to speak with him further. 6RP at 152.

While investigating the murder scene, Detectives Dean Murstig and Damon Jansen located footprints and shoe patterns in the sand near the location of the body. 6RP at 245; 9RP at 641-42. There were two other shoe patterns in the sand in addition to the shoe pattern belonging to the victim. 6RP at 245-46; 9RP at 642. The detectives documented the two shoe patterns not belonging to J.S. by identifying and marking one distinct pattern with orange flags and the other set with yellow flags. 6RP at 246; 9RP at 643. The orange and yellow flag placement revealed a trail of yellow and orange foot impressions leaving the area where J.S.'s body was and heading back towards the pavement of Beardsley Road. 6RP at 254, 259. During his interview, the defendant told detectives that he had been wearing gray and neon-yellowish green Nike tennis shoes at the time J.S. was murdered. 7RP at 328. The defendant also revealed that Joshua

Hunt had been wearing black shoes. 7RP at 328-29.

Detectives located one bullet by the pavement and two bullets in the sand near J.S.'s body. 7RP at 292, 353; 9RP at 645. An additional two bullets were recovered from the body of J.S. during the autopsy, for a total of five bullets. 7RP at 353. The bullet found near the pavement was a fired bullet. 7RP at 284-89. Of the two bullets found in the sand near J.S.'s body, one bullet was in pristine condition while the other bullet was significantly deformed. 7RP at 292. Detective Murstig testified that based on his training and experience with firearms, the striking of an object could account for the deformed nature of the one bullet. 7RP at 293. Given that J.S. suffered three gunshot wounds, and two bullets were recovered from his body, Detective Murstig's testimony regarding the recovery of the deformed bullet is consistent with the physical evidence. 7RP at 364. Detective Murstig testified that the pristine nature of the second bullet found near the body led him to believe that it had not passed through J.S.'s body. 7RP at 359-60.

When the defendant arrived at the police station, Officer Jeff Bickford escorted the defendant into an interview room, and law enforcement proceeded to speak with him about what he had witnessed that day. 8RP at 464. At one point, the defendant indicated that he wanted to go outside and smoke a cigarette, so Officers Bickford and Lien

accompanied the defendant outside. 6RP at 193. While he was smoking his cigarette, the defendant stated, "I didn't have to do it. I feel so bad. It was someone's life." 6RP at 194.

During the defendant's interview, Sergeant Kevin Berger came in to speak with Officer Bickford. 8RP at 465-66. As a result of that conversation, Officer Bickford determined that there were inconsistencies between the defendant's statements and statements given by Joshua Hunt who was being questioned at a different location by the Benton County Sheriff's Office. 8RP at 466-67. It was at this time that he provided the defendant with his Miranda warnings. 8RP at 466. After the defendant was provided his Miranda warnings, waived his rights, and agreed to speak with law enforcement, Detective Athena Clark came in to speak with the defendant. 8RP at 465, 467; 9RP at 654. The defendant was previously known to Detective Clark while she was working as a school resource officer and he was a student at Richland High School, so she hoped she could assist with the interview. 9RP at 656.

The defendant told Detective Clark that Joshua Hunt shot the victim three times. 9RP at 722. He stated that after he shot J.S., he handed the gun to the defendant. 9RP at 729. J.S.'s body was twitching. 9RP at 730. The defendant told Detective Clark that he froze up and began "tripping out" before firing. 9RP at 721. The defendant then shot J.S. in

the head, and J.S. stopping twitching. 9RP at 659, 723, 730-31. The defendant demonstrated to Detectives Clark and Bickford how he aimed and fired into the victim's head in the temple-cheek region. 8RP at 468; 9RP at 730. The defendant waited three to five seconds to make sure that J.S. had stopped moving, and walked back to the vehicle. 9RP at 739-41.

The defendant was asked where he went after the murder, and the defendant replied that he and Joshua Hunt drove to the Conoco gas station in Benton City to purchase cigarettes. 9RP at 663. Joshua Hunt went inside and bought a pack of Newport cigarettes for the defendant. 9RP at 663. Video surveillance from the Conoco shows a male wearing a white t-shirt enter the store between 6:30 and 7:00 a.m. and purchase a pack of Newport 100 cigarettes. 6RP at 103-04, 108; Ex. No. 2. From there, they left the Conoco and parked on a dead-end road. 9RP at 663. The defendant said that he was smoking the cigarettes and dropping them outside of the open window. 9RP at 665. Joshua Hunt was getting nervous about the footprints located at the murder scene and told the defendant that they needed to change shoes. 9RP at 666. Joshua Hunt got out of the vehicle, went to the trunk, and obtained a backpack. 9RP at 666. Located inside the backpack were a couple different pairs of shoes. 9RP at 666. The defendant and Joshua Hunt changed their shoes and placed the shoes that they were wearing at the murder scene inside the backpack. 9RP at 666.

They began talking about throwing the backpack into the river and that it needed to be weighted down. 9RP at 666. The defendant noticed some basalt rocks on the side of the road where the car was parked, so he picked some rocks up and placed them in the backpack. 9RP at 667. Joshua Hunt and the defendant drove to the Conoco station a second time and parked at the gas pumps. 6RP at 108; Ex. No. 4. Mr. Danner, the clerk, testified that between 7:30 and 8:00 a.m., the male who earlier purchased the Newport cigarettes entered the store and pre-paid for gas. 6RP at 104-05. This was corroborated by video surveillance. 6RP at 108; Ex. No. 3. The defendant entered the store while Joshua Hunt remained outside. Ex. No. 5. The Conoco surveillance video shows the defendant enter the store while Joshua Hunt stays at the vehicle. Exs. No. 4, 5. Joshua Hunt is then seen removing a backpack from the trunk of the vehicle and walking toward the area of the river. Ex. No. 4. A short time later, he returns without the backpack. Ex. No. 4.

After the interview had concluded, and as the defendant was being transported to the Benton County Jail, Richland detectives instructed Officer Lien to transport the defendant to the Conoco station in Benton City. 6RP at 194-95. Detectives were attempting to locate Newport cigarette butts and to determine where the defendant and Joshua Hunt had parked the car following the murder. 6RP at 195. When Officer Lien and

the defendant arrived at the location, the defendant pointed to where the car had been parked, and officers located the Newport cigarette butts. 6RP at 195; 9RP at 661. The defendant also directed officers to the location where he picked up rocks to place in the backpack. 6RP at 195-96. Near where the cigarette butts were located, Detective Clark and Officer Lien found rock indentations in the dirt that looked to be recent. 6RP at 195; 9RP at 668. As Officer Lien was booking the defendant into the Benton County Jail, the defendant asked Officer Lien, "What do you think, I'm gonna get five years?" 6RP at 197.

On July 15, 2013, Detective Murstig went to the river by the bridge adjacent to the Conoco in an attempt to locate the backpack. 6RP at 211; 7RP at 293-94. Detective Murstig was accompanied by Mark Allen of Allen Water Rescue Services, and two other water rescue personnel, Scott Winsor and Lane Winsor, who were to perform a water search for the backpack. 6RP at 215; 7RP at 293. Shortly after initiating the search, Mr. Allen located a black backpack at the bottom of the river. 6RP at 219. After Mr. Allen brought the backpack to the surface, Detective Murstig opened the backpack to let the water out and noticed two pairs of shoes inside the backpack. 7RP at 297-98. One set of shoes was a gray pair of Nikes and the other was a pair of red and black Adidas. 7RP at 298. The defendant admitted to wearing gray Nikes at the time that J.S. was killed

and also admitted that Joshua Hunt was wearing black shoes. 7RP at 328-29. At trial, Detective Murstig testified that the footprints, identified by the orange flags, were consistent with the defendant's Nike shoes recovered from the Yakima River. 7RP at 331. The footprints, identified by the yellow flags, were consistent with Joshua Hunt's red and black Adidas shoes recovered from the Yakima River. 7RP at 331. The yellow flag shoeprints from Joshua Hunt were closer to the feet area of J.S., while the orange flag shoeprints from the defendant were closer to J.S.'s head. 7RP at 331-33.

Also located inside the backpack was a plastic container that holds ammunition in place, three live rounds of ammunition, an ammunition box, and four empty cases of ammunition. 7RP at 303, 307. Detective Murstig also located rocks inside the backpack. 7RP at 312-13. Detective Clark testified that the rocks recovered from the backpack appeared to be consistent with the area in which Joshua Hunt's vehicle was parked following the murder. 9RP at 667-68.

Located inside the left Nike shoe were ten spent shell casings. 7RP at 304. Found inside the left Adidas shoe was a revolver-type handgun. 7RP at 308. Upon further inspection, the handgun was determined to be a Charter Arms five-shot revolver. 7RP at 309. Detective Murstig testified that the cylinder is only capable of holding five rounds of loaded

ammunition. 7RP at 309. This is consistent with the total number of bullets recovered from the murder scene and found in J.S.'s body. 7RP at 292, 353; 9RP at 645. Terry Franklin, a firearms expert and supervising forensic scientist with the Washington State Patrol Crime Lab, testified that all five fired bullets and all cartridges were fired by the Charter Arms revolver located in the backpack. 8RP at 490-91, 505.

The matter proceeded to trial where the jury convicted the defendant of Murder in the First Degree with a firearm enhancement. CP 214, 216. He was sentenced to 372 months, including the 60-month firearm enhancement. CP 220, 224.

III. ARGUMENT

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The first prong requires a showing that "counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." *Thomas*, 109 Wn.2d at 226. Courts will indulge in a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336.

Under the second prong, prejudice is shown when the defendant can establish with reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A difference of opinion as to trial tactics does not constitute denial of effective assistance of counsel. *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981). Tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been

available. *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir. 1984). For example, there may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986), *sentence vacated on writ of habeas corpus sub nom*, 754 F.Supp. 1490 (1991). Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).

The appellate test for ineffective assistance of counsel is "whether, after an examination of the whole record, the court can conclude appellant received effective representation and a fair trial." *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988) (citing *State v. Smith*, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985), and *State v. Johnson*, 74 Wn.2d 567, 570, 445 P.2d 726 (1968)).

1. Trial counsel's performance was not deficient when he stipulated to the admissibility of his client's voluntary confession.

The defendant asserts that trial counsel's performance was deficient when he stipulated to the admission of the defendant's voluntary confession because there was no independent evidence, apart from the

confession, sufficient to establish all the elements of first degree murder. However, trial counsel was not deficient for stipulating to the admissibility of the confession because the stipulation was based on legitimate trial strategy, considering the State had ample evidence independent of the defendant's confession to satisfy the corpus delicti rule.

"Corpus delicti" literally means "body of the crime." *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In Washington State, a confession, standing alone, is insufficient to establish the corpus delicti of a crime. *State v. Smith*, 115 Wn.2d 775, 801 P.2d 975 (1990). The rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. *See Smith v. United States*, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192 (1954).

The corpus delicti rule is to ensure other evidence supports the defendant's statement and satisfies the crime's elements. *State v. Dow*, 168 Wn.2d 243, 249, 251, 227 P.3d 1278 (2010). It can be proved by either direct or circumstantial evidence. *Aten*, 130 Wn.2d at 655. The rule is described as follows: The confession of a person charged with the commission of a crime is not sufficient to establish the corpus delicti, but if there is independent corroborating evidence, such confession may then be considered in connection therewith and the corpus delicti established by a combination of the independent proof and the confession. *Smith*, 115

Wn.2d at 781.

To determine the sufficiency of the independent evidence under corpus delicti, the truth of the State's evidence is assumed and all reasonable inferences are viewed in a light most favorable to the State. *Aten*, 130 Wn.2d at 656. The circumstantial evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Lunch*, 70 Wn.2d 365, 372, 423 P.2d 72 (1967). The independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. *Smith*, 115 Wn.2d at 781. The independent evidence must only provide prima facie corroboration of the defendant's statement. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

Prima facie in this context means that there is "evidence of sufficient circumstances which would support a logical and reasonable inference" of the facts sought to be proved. *Aten*, 130 Wn.2d at 656. The evidence need not be enough to support a conviction or send the case to the jury. *Id.* However, if no such evidence exists, the defendant's confession or admission cannot be used to establish the corpus delicti and prove the defendant's guilt at trial. *Id.* In a homicide case, only two elements are necessary to establish the corpus delicti: (1) the fact of death, and (2) a causal connection between the death and a criminal act. *Aten*,

130 Wn.2d at 655; *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967); *State v. Little*, 57 Wn.2d 516, 521, 358 P.2d 120 (1961); *State v. Richardson*, 197 Wn. 157, 163, 84 P.2d 699 (1938). The corpus delicti rule does not require proof of a causal relation between the death and the accused. *State v. Meyer*, 37 Wn.2d 759, 226 P.2d 204 (1951).

The death of J.S. and discovery of his body proves the first element of the corpus delicti – the fact of the death. The next question is whether the independent evidence corroborating the defendant's confessions or admissions supports a reasonable and logical inference that J.S.'s death was caused by a criminal act.

The defendant was charged with Murder in the First Degree under RCW 9A.32.030. CP 82-83. Jury Instruction No. 9 submitted to the jury stated, "[a] person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he causes the death of such person or of a third person." CP 200. The to-convict instruction contained in Jury Instruction No. 10 stated the elements of the offense:

> To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 4th day of July, 2013, the defendant acted with intent to cause the death of [J.S.];
> (2) That the intent to cause the death was premeditated;

(3) That [J.S.] died as a result of the defendant's acts; and
(4) That any of those acts occurred in the State of Washington.

CP 201.

The corpus delicti rule does not require that the State prove, absent the defendant's confession, he acted with premeditated intent to cause the victim's death. *Smith*, 115 Wn.2d at 783. The State must only produce sufficient circumstances which would support a logical and reasonable deduction that a premeditated intent to cause the victim's death occurred. *Id.*

In *State v. Dow*, defendant Dow was charged with Child Molestation in the First Degree. *Dow*, 168 Wn.2d at 247. At the time of the alleged offense, the child was three years old. *Id.* The State acknowledged that the victim was too young to testify. *Id.* The State conceded there was no evidence independent of Dow's statement to the police that the crime occurred. *Id.* The State nevertheless argued that Dow's statements were trustworthy and should be admitted under RCW 10.58.035. *Id.* Said statute allowed a defendant's statements into evidence even where independent evidence of the crime was absent, so long as certain statutory indication of trustworthiness of the statements was present. *Id.* at 253. The trial court declined to admit the statements and dismissed the case. *Id.* at 248. The Supreme Court affirmed the dismissal,

holding that even if Dow's statements were trustworthy and should have been admitted, RCW 10.58.035 pertained "only to admissibility" and did not relieve the State of the burden of presenting sufficient evidence independent of a defendant's confession to support a conviction. *Id.* at 253-54. Given the State conceded there was no corroborating evidence independent of Dow's statement, the Court held the corpus delicti was not satisfied. *Id.* at 254. In reaching this conclusion, the Supreme Court stated: "[T]he State must still prove every element of the crime charged by evidence independent of the defendant's statement." *Id.* at 254.

In *State v. Hummel*, relying on the Supreme Court's statement in *Dow*, defendant Hummel argued that the independent evidence presented at his trial did not establish every element of the charged crime, specifically that the victim's death was caused by a person with the requisite mental state for first degree murder, premeditated intent. *State v. Hummel*, 165 Wn. App. 749, 266 P.3d 269 (2012). In analyzing *Dow*, the *Hummel* Court stated:

> [I]f the cited statement is to be taken at face value, as is urged by Hummel, it directly contradicts, without explicitly overruling or distinguishing, decades of supreme court and court of appeals decisions holding that proof of identity, while a necessary element to be proved at trial, need not be proved to establish the corpus delicti of the charged crime. Moreover, neither Hummel nor the *Dow* court cite to any case holding that every element of the charged crime need be proved to establish the corpus delicti.

Id. at 765-66. In rejecting Hummel's argument, the Court adhered to the view that the evidence is sufficient to establish the corpus delicti in a homicide case if it leads to a reasonable and logical inference of death and a causal connection between the death and the criminal act. *Id.* at 769.

In the instant case, the defendant argues that the independent evidence was insufficient to satisfy the corpus delicti rule, and further that the independent evidence must prove every element of the crime charged, including the requisite mental state of premeditated intent. Just as the defendant in *Hummel*, the defendant in the instant matter's reliance on *Dow* is misplaced. The State is not required to prove every element of the crime charged by evidence independent of the confession; rather, it is sufficient to establish the corpus delicti in a homicide case if it leads to a reasonable and logical inference of death and a causal connection between the death and the criminal act.

In the instant case, there is overwhelming evidence, independent of the defendant's confession, that leads to a reasonable and logical inference of J.S.'s death and a causal connection between his death and a criminal act. The State's corroborating evidence consisted of physical evidence as well as witness testimony.

The physical evidence located in the backpack included: a revolver-type handgun, determined to be the murder weapon; rocks; a pair

of black and red Adidas shoes; a pair of gray Nike shoes; a plastic holder that holds ammunition in place; three live rounds of ammunition; ten spent shell casings of ammunition; a plastic grocery sack; an ammunition box; and four empty cases of ammunition. 7RP at 298, 303-04, 307-08, 312-13. The evidence located near the Conoco gas station included three Newport cigarette butts. 9RP at 662. The physical evidence found at the murder scene included three bullets and the body of J.S., from which two additional bullets were recovered and determined to have been fired from the firearm located in the backpack. 7RP at 292, 353.

Detective Clark and Officer Lien testified that after they recovered the Newport cigarette butts, they located rock indentations in the dirt that appeared to be recent in the same location. 6RP at 195; 9RP at 661, 668. Detective Clark testified that the rocks recovered from the backpack appeared to be consistent with the area in which the vehicle was parked following the murder when the defendant smoked Newport cigarettes and discarded them out of the car window onto the ground. 9RP at 667.

Detective Murstig testified that on July 4, 2013, he responded to a homicide scene on Beardsley Road, where the body of J.S. was discovered. 6RP at 223-24. He was found lying in the sand, partially facing down, with his hat in his hands clutched to his chest. 6RP at 238. There was a significant amount of blood present on the right side of his

face. 6RP at 243. There appeared to be two other shoe patterns present in the sand in addition to the shoe pattern that belonged to the victim. 6RP at 245-46. Detective Murstig confirmed that the shoeprints, identified at the murder scene by orange flags, were consistent with the defendant's Nike shoes recovered from the backpack in the Yakima River. 7RP at 331.

Detective Murstig also testified that a total of five bullets were recovered from the murder scene. 7RP at 292, 353. Detective Murstig confirmed that the firearm recovered from the river is only capable of holding five rounds of loaded ammunition. 7RP at 309. There were no live rounds in the firearm at the time it was recovered from the Yakima River. 7RP at 310-11. Terry Franklin, Washington State Patrol Crime Lab firearms expert, testified that the cartridges from the backpack were fired by the Charter Arms revolver located in the backpack. 8RP at 490-91, 505. Mr. Franklin also confirmed that all five bullets recovered at the murder scene were fired by the Charter Arms revolver found in the backpack and by no other firearm in the world. 8RP at 505.

G.B., a friend of both the defendant's and Joshua Hunt's, testified that toward the end of June of 2013, Joshua Hunt purchased a firearm through G.B.'s cousin, Mr. Cellarzone. 8RP at 407. G.B. also testified that he had been with the defendant and Joshua Hunt on July 3, 2013, the day before J.S.'s murder. 7RP at 381. G.B. went to the skate park in Richland

around 11:00 a.m., and saw the defendant and Joshua Hunt hanging out. 7RP at 382. The three of them spent most of the day between the skate park and the river. 7RP at 382. While at the skate park, the defendant, Joshua Hunt, and G.B. were in Hunt's vehicle discussing J.S. 7RP at 383-84; 9RP at 606. G.B. recalled that Joshua Hunt asked the defendant if he knew of a place to go to take J.S., and the defendant responded that he knew of a place they could go. 7RP at 385-86. The defendant and Joshua Hunt then proceeded to talk about bullets. 7RP at 385. Joshua Hunt told the defendant that he already had five bullets if he wanted to take J.S. to the place that the defendant was referring to. 7RP at 386. Joshua Hunt asked the defendant if they should take a pillow to "muzzle out" the sounds. 7RP at 388. G.B. revealed that on a couple of occasions, Joshua Hunt told G.B. that he wanted to kill J.S., and that on one prior occasion, he overheard Joshua Hunt and the defendant talk about killing J.S. 7RP at 384-85.

Josiah Brown, an acquaintance of both the defendant's and Joshua Hunt's, testified that on July 3, 2013, he attended a house party where the defendant and Joshua Hunt were present. 8RP at 516-17. At one point, J.S. showed up to the party. 8RP at 517. At approximately 4:00 a.m. on the morning of the murder, the defendant and Joshua Hunt gave Mr. Brown and A.M. a ride to a 7-11 convenience store. 8RP at 518-19. At one point

during the ride, Mr. Brown heard the defendant say that he wanted to go out to the desert to clear his mind. 8RP at 520.

A.M., an acquaintance of both the defendant's and Joshua Hunt's, testified that he witnessed the defendant and Joshua Hunt in possession of a firearm. 8RP at 527. A.M. had travelled out to a road with the defendant and Joshua Hunt, and the defendant and Joshua Hunt fired off a couple of rounds while A.M. and his friend stayed in the vehicle. 8RP at 527. After the defendant and Joshua Hunt came back to the vehicle, they showed A.M. a revolver-type gun. 8RP at 528. On July 3, 2013, A.M. attended a house party where the defendant and Joshua Hunt were present. 8RP at 529. At approximately 4:00 a.m. on the morning of July 4, 2013, Joshua Hunt, along with the defendant and Mr. Brown, drove A.M. and Mr. Brown from the house party to 7-11. 8RP at 531.

C.K., the victim's ex-girlfriend and an acquaintance of both the defendant's and Joshua Hunt's, testified to seeing the defendant with a gun. 9RP at 595. Prior to the murder, the defendant, Joshua Hunt, C.K., A.M., and two other individuals went to a secluded road in Benton City to shoot a gun. 9RP at 596. At first, Joshua Hunt had the gun in his hand, and then the defendant showed C.K. how to hold and shoot the gun. 9RP at 599. When asked why they needed a gun, the defendant replied that they would get rid of it in a few days. 9RP at 600-02. C.K. also testified that on

July 3, 2013, the day before the murder, C.K. walked to the skate park and saw the defendant, Joshua Hunt, G.B., and Gerald Hyde. 9RP at 605. The defendant, Joshua Hunt, and G.B. were in the car together. 9RP at 605-06. While at the skate park, the defendant told Joshua Hunt they should go to Horn Rapids that night, which was the area in which J.S.'s body was eventually discovered. 9RP at 606. C.K. objected and told the defendant and Joshua Hunt that they were not going to ditch her. 9RP at 606. Later on that night, the defendant, Joshua Hunt, A.M., Mr. Hyde, and C.K. drove to a house party on Williams Street. 9RP 607-08. J.S. arrived at the house party and spoke with C.K. outside near the Wishy Washy for approximately one hour. 9RP at 610-11. At some point, they were all asked to leave the house. 9RP at 612. After giving Mr. Brown and A.M. a ride home, Joshua Hunt and the defendant picked C.K. and J.S. up in Joshua Hunt's vehicle. 9RP at 613-15. Joshua Hunt and the defendant drove to C.K.'s home and dropped her off at the front of her apartment complex. 9RP at 617. The defendant, Joshua Hunt, and J.S. were the only individuals in the car when C.K. left the vehicle. 9RP at 617. This was the last time C.K. saw J.S. alive. 9RP at 617.

The video surveillance also places the defendant and Joshua Hunt together following the murder with the murder weapon and the other evidence located in the backpack. Exs. No. 1-5.

The totality of the independent evidence in this case leads to the conclusion that there is a "reasonable and logical" inference that J.S. died as a result of Murder in the First Degree and that inference is not the result of mere conjecture and speculation. The independent proof and evidence corroborated the defendant's oral confession that he acted with premediated intent to cause the death of J.S. Even without the defendant's confession, the State's evidence, physical and witness testimony, supports a logical and reasonable deduction that a premeditated intent to cause the death of J.S. occurred.

Thus, the State's evidence supports a prima facie showing of the corpus delicti of Murder in the First Degree. In considering all of the aforementioned factors, one can conclude trial counsel made a tactical decision to stipulate to the admission of the defendant's voluntary confession. As such, trial counsel's performance was not deficient.

2. If this Court finds that trial counsel's performance was deficient for stipulating to the admissibility of the defendant's voluntary confession, the defendant cannot show he suffered actual prejudice.

If this Court determines that trial counsel's performance was deficient, the defendant has still failed to show he suffered actual prejudice to warrant setting aside the murder conviction. Trial counsel's stipulation to the admissibility of the defendant's voluntary confession did not

prejudice the defendant because trial counsel's decision was a legitimate trial strategy. Additionally, because there was sufficient evidence of the corpus delicti, independent of the defendant's statements, to support a logical and reasonable inference that J.S.'s death was caused by a criminal act, the defendant cannot show that he suffered actual prejudice.

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to the defendant affirmatively proving prejudice. *Strickland*, 466 U.S. at 693. To make a showing of prejudice, the standard requires that the defendant show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 322.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Strickland*, 466 U.S. at 695. A verdict or conclusion only weakly supported by the record is more likely to have been affected by the errors than one with overwhelming record support. *Id.* at 697. Taking the unaffected findings as given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would likely have been different absent the errors. *Id.* at 696.

Because the adversary system requires deference to counsel's

informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. *Washington v. Strickland*, 693 F.2d 1243, 1254 (5th Cir.1982), *rev'd on other grounds*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel may still be effective even if counsel does not conduct a substantial investigation into every plausible line of defense. *Strickland*, 466 U.S. at 668. However, counsel may not exclude certain lines of defense for other than strategic reasons. *Strickland*, 693 F.2d at 1257-58. "Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence." *Strickland*, 466 U.S. at 681. Strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. *Id.* Therefore, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 692 F.2d at 1255 (footnote omitted).

The defendant argues that trial counsel's stipulation to admissibility of the voluntary confession precluded him from raising a defense of the corpus delicti rule. Even if the defendant shows that the

particular error of counsel was unreasonable, the defendant must show that it actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. It is not enough for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. *Id.* Virtually every act or omission of counsel would meet that test, *cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-67, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. *Strickland*, 466 U.S. at 693.

In *State v. Fisher*, trial counsel considered making a motion to suppress based on the warrantless arrest, but chose not to do so. *State v. Fisher*, 74 Wn. App. 804, 874 P.2d 1381 (1994). Whether this decision reflects a legitimate trial strategy or tactic cannot be determined from the record, but the existence of exigencies provides a plausible reason for trial counsel to have decided not to move for suppression. *Id.* at 811.

In the instant case, the defendant does not allege that his confession was unlawfully obtained, but rather the failure of trial counsel to move to suppress his voluntary confession precluded him from raising a defense for lack of independent evidence. The defendant's assertion that trial counsel's decision relieved the State of proving the necessary elements of first degree murder is false. The State produced ample

evidence, independent of the defendant's statements, to establish the necessary elements of Murder in the First Degree. The additional evidence presented at trial in this matter supported the defendant's guilt of Murder in the First Degree.

The trial record demonstrates that even if counsel had not stipulated to the admission of the confession, the outcome would not have been any different. Therefore, the defendant suffered no prejudice resulting from trial counsel's stipulation to the admissibility of the voluntary confession. While the defendant may disagree with trial counsel's tactical decision to stipulate to the confession, it is not a basis for an ineffective assistance of counsel claim. Additionally, the State presented sufficient evidence of the corpus delicti, independent of the defendant's statements, to support a logical and reasonable inference that J.S.'s death was caused by a criminal act.

The defendant failed to meet the two prongs required for a valid claim of ineffective assistance of counsel. First, the defendant failed to show that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant failed to show that the alleged deficient performance prejudiced the defendant in such a way as to deprive him of a fair trial. Considering all of the circumstances, trial

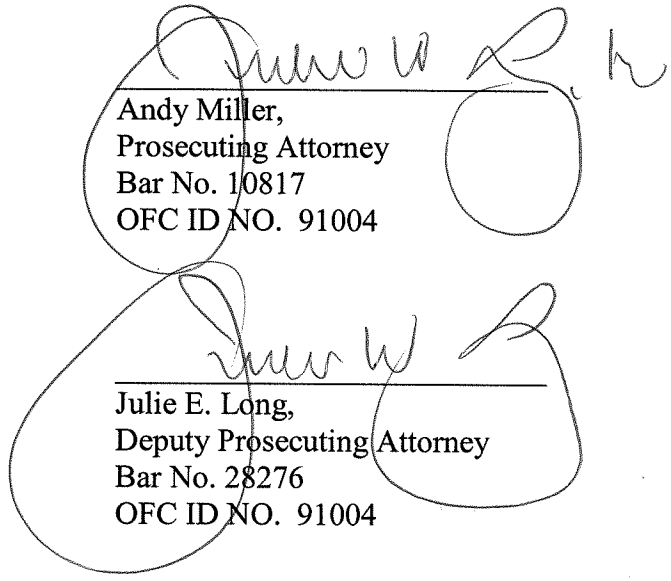
counsel's performance was not deficient.

IV. CONCLUSION

Based upon on the aforementioned facts and authorities, the defendant's appeal should be denied and the conviction affirmed.

RESPECTFULLY SUBMITTED this 31st day of March, 2016.

ANDY MILLER
Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on March 31, 2016.

Courtney Alsbury
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