NO. 94047-9

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

RESPONDENT

v.

JOHNATHON FLORES

DEFENDANT / PETITIONER,

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. There is not a basis to support Ineffective assistance of counsel based on CrR 3.1 or lack of objections at trial.
2. Inability to call impeachment witnesses did not support a claim of ineffective assistance of counsel.
3. Any claimed errors were harmless based on the overwhelming evidence

B. STATEMENT OF THE CASE

1. Substantive Facts

On May 16, 2013, at approximately 6:00 pm, Omak Police Officers responded to a 911 call of a reported stabbing at 216 North Birch in Omak, WA. RP 129, 130, 140, 158, 203. Sgt. Koplin observed the victim, Jeff Weitman, outside the residence with a large amount of blood coming from Mr. Weitman's right leg. RP 139. Sgt. Koplin contacted Mr. Weitman and called for an ambulance. RP 140, 203.

Officers spoke with Jeffrey Weitman while he was simultaneously being treated by ambulance personnel for the injury to his leg. RP 131. Officers learned there were three people (two male, one female) who had run from the area. RP 130-131. Mr. Weitman identified and described the two males as "Spanky" and "Jesse", and identified the female as Faith Flores. RP 131,140, 205-06. Mr. Weitman did not know if the suspects were still in 216 North Birch Street. RP 140, 205-06.

Officers went to the 216 North Birch. RP 140. They made contact with Sandra McCorkle, who told officers an altercation had taken place inside her

residence. RP 141,142, 157. Ms. McCorkle told officers that Faith Flores and Mr. Weitman had been in a verbal argument at McCorkle's house the night before, and that Mr. Weitman may have pushed her. RP 132. Faith Flores said she would be back with her brothers to have a talk with Mr. Weitman. RP 132. Ms. McCorkle told the officers that the suspects came back to her house today, that Mr. Weitman was invited to the house, but she was told that they were not going to hurt Mr. Weitman RP 132-133.

Ms. McCorkle stated that during the altercation, she heard glass breaking, and when she came out Mr. Weitman was gone and the three others were in the living room discussing what they were going to do. RP 133, 134. The three suspects ran out the front door, but Ms. McCorkle did not know which direction they went. RP 142. She indicated "Spanky" was Johnathon (John) Flores, and the other was a Hispanic male named Jesse. RP 134,287-88. The information about John Flores was used to create a photomontage. RP 134.

Sgt. Koplin then went to the hospital shortly after Mr. Weitman was transported from the scene and contacted Mr. Weitman in the emergency room. RP 143. Sgt. Koplin observed numerous injuries to Mr. Weitman, including a stab wound to the leg, and scrapes and scuffs to his forehead and knees. RP 144-45. There were no observable fresh injuries to Mr. Weitman's hands. RP 145.

Mr. Weitman believed that Spanky's name was Johnathon, and he did not know the other subject that was with him. Mr. Weitman indicated it was the

Hispanic suspect, who inflicted the stab wound to him, but both of them had assaulted him. RP 147-148. Mr. Weitman also thought the two suspects were Faith Flores' brothers. RP 147. Det. Tallant also interviewed Mr. Weitman after he was released from the hospital. RP 169. During his initial testimony, Det Tallant was not asked questions about specific statements of Mr. Weitman made during that interview. The State stopped Det. Tallant's testimony in order to call the hospital records custodian, Mr. Weitman, Ms. McCorkle, and Faith Flores. RP 170, 173, 178, 243, 281.

Jeff Weitman testified that he lived with Ms. McCorkle of and on for approximately ten years, but was not living with her on May 16, 2013, the date of the assault. RP 179, 281. Mr. Weitman knew Faith Flores, and stated the Ms. Flores came to Ms. McCorkle's regularly. RP 181. Mr. Weitman and Ms. Flores did not get along. RP 181, 283-84. Mr. Weitman testified on direct that he had a previous gross misdemeanor conviction for attempted taking of a motor vehicle in the second degree 2007. RP 181.

On May 15, 2013, Ms. Flores confronted Mr. Weitman about a Facebook page Mr. Weitman had left open on a cellular phone that contained a message between Mr. Weitman and another woman. RP 182-183, 186-86. Mr. Weitman grabbed the phone from Ms. Flores and logged off of Facebook. Ms. Flores told Mr. Weitman that he had messed up and that she was going to call her brothers. RP 184, 285. Ms. Flores called her brother John Flores while Mr. Weitman was

still at the residence and was heard telling her brother that Mr. Weitman had hurt her and was disrespectful. RP 185-85, 287, 305. Ms. Flores then handed the phone to Mr. Weitman. The defendant John Flores told Mr. Weitman that he wanted to talk to him when he got to town. RP 185, 206. Mr. Weitman gathered his personal items and left Ms. McCorkle's residence. RP 183-84, 185.

Later that day, Mr. Weitman saw Ms. Flores at a gas station. Ms. Flores threatened to blow Mr. Weitman's kneecaps out, to take his car, and steal his money. RP 186, 251, 274-75, 288.

On May 16, Mr. Weitman called Ms. McCorkle to borrow a weed eater. RP 187, 291-92. Mr. Weitman did not believe anyone but Ms. McCorkle was home. He spoke with Ms. McCorkle after entering the front door, and then proceeded to the kitchen and opened the freezer to get ice water. RP 189-90, 293. When he closed the freezer door, the defendant John Flores and Jesse Flores were standing there. RP 191. John Flores accused Mr. Weitman of being disrespectful to women, and then Faith Flores took Ms. McCorkle into a back room. RP 192, 194, 195, 201, 297.

Mr. Weitman was familiar with John Flores and knew him by his nickname - Spanky. RP 190-91, 208. He had never seen John Flores at Ms. McCorkle's house before. RP 200 He did not know Jesse Flores at the time. RP 191, 200. Mr. Weitman backed up to the dishwasher as they approached him. RP 194, 264, 294-95. Jesse Flores had a black knife displayed and Mr. Weitman was told to

take everything out of his pockets. RP 195, 196, 197, 204, 195, 196, 199, 209, 262-63.

Mr. Weitman tried to get out of the house through the backdoor, but was unable to do so. RP 195, 200. John Flores was near the door and put his foot in front of the door to prevent Mr. Weitman from leaving. RP 195, 302. Mr. Weitman indicated the deadbolt on the back door was newly installed within the last day or two. RP 193. As Mr. Weitman tried to escape, he was hit and kicked by both suspects and fell down to one knee. RP 195, 197, 198, 216, 265, 274. Mr. Weitman got up and then tried to escape toward the front door, but was pushed into chair, breaking the nearby china cabinet. RP 195-96, 198, 215-16, 298. Mr. Weitman noticed he was bleeding from his leg. RP 196. Mr. Weitman suffered a stab wound to his leg, inflicted by Jesse Flores. RP 203-04, 209, 265-66. Mr. Weitman was bleeding heavily and the suspects pushed him out the back door, and kept his property. RP 198-99, 265-66. Mr. Weitman went to a nearby residence and called 911. RP 202-203, 299-300.

At trial, Faith Flores testified Mr. Weitman had shoved her when he took the phone from her, on May 15, and that she shoved him back. RP 247, 253, 286. She called her brother John Flores, who was going to come over and "talk" with Mr. Weitman; she also gave the phone to Mr. Weitman so John Flores could speak with him. RP 248, 250. Ms. Flores stated she wanted Mr. Weitman beat up. RP 255. Mr. Flores showed up at Faith Flore's residence that night (May 15)

with Jana Mason. RP 255-56. John Flores came back to Ms. Flores' apartment on May 16, and Ms. Flores, Jesse Flores, and John Flores were driven to Ms. McCorkle's residence by Jana Mason. RP 258, 289-89. Ms. Flores left her truck at her apartment, because she believed Mr. Weitman would not show up if it were parked at Ms. McCorkle's residence. RP 258. Ms. Flores stated they did not believe Mr. Weitman would come to Ms. McCorkle's house if he knew they were there. RP 249, 259. Ms. Flores, John Flores, and Jesse Flores remained out of sight when Mr. Weitman arrived. RP 260-261, 292. They confronted Mr. Weitman in the kitchen. RP 261-62.

After the attack on Mr. Weitman, the three suspects fled from the residence on foot. John Flores called Jana Mason, who picked them up and drove them from the area. RP 266-67, 299-300, 357.

Mr. Weitman also testified that prior to the trial he was contacted about the case by Michaela Flores (the defendant's wife) and that he told her that he probably would not show up for court, in an effort to end contact with her. RP 204.

In October 2013, John Flores placed a call from the Okanogan County Jail to Jana Mason, and asked her to write a statement on his behalf stating that she was present the whole time. He indicated he would send her a letter telling her what to put in her statement. RP 317-18

During the State's case, defense counsel cross-examined Mr. Weitman on the demeanor and actions of Jesse Flores before and during the attack; in

comparison to the defendant's demeanor and actions. RP 207-212. Defense counsel cross-examined Ms. McCorkle about not seeing the assault or hearing threats being made. RP 301-304. Ms. Flores was cross examined on the differences in her statements, her plea agreement to testify, and asked questions to try to establish that Jesse Flores was the primary actor in the physical assault on Mr. Weitman. RP 270-271, 276-77.

The defense called Jesse Flores. He testified Faith Flores called him May 15. He said that prior to that call he did not have any knowledge of Mr. Weitman, but called Weitman told him to stay away from Faith Flores. RP 340,354. He testified that John Flores showed up on that same day. RP 355. Jesse Flores stated they were all dropped off at McCorkle's house on May 16. RP 356. He testified that John Flores was near him when he took out his knife, opened it, and demanded that Mr. Weitman empty his pockets. RP 360-61. He stated he stabbed Mr. Weitman and that he told Mr. Weitman to remove items from his pocket. RP 340, 341. He stated that when they confronted Mr. Weitman he tried to get out the house several times, and that John Flores was close by. RP 341,361-363.

Jesse Flores claimed that John Flores did not know what was going to happen. RP 342. Yet, after the robbery, Jesse said that John went back to Spokane, because Jesse did not want John to violate his DOC conditions. RP 358

Defense also sought to call investigator Bob Gaines to attempt to impeach Mr. Weitman claiming inconsistent statements. RP 365 Defense provided a written statement from Mr. Gaines. RP 365. The State objected to calling Mr. Gains, noting there were no substantive differences between Mr. Weitman's testimony and the statement from Mr. Gains. RP 365-366. In addition, defense did not inquire of Mr. Weitman on cross about his interview with Mr. Gains. The State and the court pointed out that there were no relevant inconsistencies between the testimony and the proffered statement necessary to offer it as impeachment. RP 365-369, 370. The court pointed out it was also not inconsistent with Ms. McCorkle's own testimony RP 370.

Defense also sought to call Michaela Flores, claiming she had conversations with Mr. Weitman about the incident involving the defendant, to allege Mr. Weitman told her the defendant did not do it. RP 378. However, defense indicated that were *not* seeking to offer her testimony for impeachment. RP 375-76. The State objected on hearsay grounds and the court sustained the objection. RP 376, 379-80.

2. Procedural Facts

The defendant was charged by information as a principal or as an accomplice with the crimes of robbery in the first degree and assault in the first degree. CP 149-151.

Attorneys Melissa MacDougall and Mubarak Raheem were attorneys associated with the defendant's case. Ms. MacDougal appeared and filed both pre-trial pleadings and post-conviction pleadings. CP 8-26, CP 47-50, RP 506-547. The record is silent on whether or not Ms. MacDougal was present in the courtroom during trial.

Attorney Raheem filed certificates of compliance with CrR 3.1, including April 3, 2014, March 3, 2014, and December 3, 2013. CP 183. However, after the notice of appeal was filed, Attorney Raheem sent a declaration to appellate counsel claiming he had not met the requirements of CrR 3.1 and SID 14.2.[1] However, Mr. Raheem's declaration indicates he entered practice in December 2011, and came to work for MacDougall Prince, LLC, in December 2013. Mr. Raheem also declared he had handled significant portions of three felony cases submitted to a jury, including primary or sole trial counsel on two class B felony cases. CP 152-153. On its face, the declaration appeared to satisfy guidelines of

[1] SID 14.2(B) states:

> Adult Felony Cases--Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:
> i. The minimum requirements set forth in Section 1; and
> ii. Either:
> a. has served two years as a prosecutor; or
> b. has served two years as a public defender; or two years in a private criminal practice; and
> iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

CrR 3.1 and SID 14.2. Despite the concluding paragraph, the declaration did not establish how Mr. Raheem was not qualified under CrR 3.1 or SID 14.2.[2]

At trial, the jury was instructed on accomplice liability in jury instruction #15 (WPIC 10.51). RP 412. On March 19, 2014, the defendant was convicted of robbery in the first degree, assault in the first degree, and found to be in possession of a deadly weapon during the commission of the robbery. RP 469-70.

C. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED

Review should be not be granted in the present case pursuant to RAP 13.4.[3] The Court of Appeals decision is in accord with existing case law, the issues raised by Petitioner are not a significant question of law, and do not involve a substantial issue of public interest.

1. <u>There is not a basis to support Ineffective assistance of counsel based on CrR 3.1 or lack of objections at trial.</u>

---

2 SID 14.2 does not limit experience to solely private or solely public practice. The presence or lack of relevant experience cannot not be inferred from the attorney's declaration. The declaration is silent on work performed prior to being employed by MacDougall Prince LLC. Even if Mr. Raheem had actually declared that he lacked prior criminal experience before joining MacDougall Prince, then he arguably would not have met the experience guideline for trial in any felony case under SID 14.2. Curiously, there is no indication Mr. Raheem filed any similar declaration in any of his other felony trial cases; that he advised the court in this case, or any other case, that he believed he was non-compliant with CrR 3.1; or that he ever corrected or amended his certifications filed with the court.

3 RAP 13.4 (b) states: A petition for review will be accepted by the Supreme Court only:
(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Claims of ineffective assistance of counsel are unique in constitutional criminal procedure.[4] In the context of ineffective assistance of counsel, however, "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). While the United States Supreme Court has held that this seemingly counterintuitive result is dictated by the Sixth Amendment, this expansion of the Sixth Amendment right to counsel should be stretched no further than necessary to protect the core purpose of the constitutional right. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). That purpose is to ensure that counsel's representation does not "so undermine" the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result". *Strickland*, 466 U.S. at 686.[5] The integrity of the criminal justice system is

4 For all other claims of constitutional error, an overturning of a conviction is triggered by some error committed by the state or its agents, such as passing a vague law, see *Connally v. Gen. Const. Co.*, 269 U.S. 385, 393, 46 S. Ct. 126, 70 L. Ed. 322 (1926), coercing a confession, see *Brown v. State of Mississippi*, 297 U.S. 278, 286, 56 S. Ct. 461, 80 L. Ed. 682 (1936), or withholding exculpatory evidence, see *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

5 Under Strickland, courts do not presume prejudice unless the trial "loses its character as a confrontation between adversaries," *State v. Carson*, 184 Wash. 2d 207, 226, 357 P.3d 1064, 1074–75 (2015) (quoting *State v. Webbe*, 122 Wash. App. 683, 694–95, 94 P.3d 994 (2004)), as when there is (1) a complete denial of the assistance of counsel, (2) the State's interference with counsel's assistance, or (3) an actual conflict of interest. See *Webbe*, 122 Wash. App. 683; *Strickland*, 466 U.S. at 692; *In re Davis*, 152 Wash. 2d 647, 674, 101 P.3d 1 (2004).

threatened when the state is forced to defend its convictions against conduct over which it has no control, and such threats should be minimized.

Reversing a conviction, particularly in collateral proceedings where these claims are usually litigated, is contrary to the "profound importance of finality in criminal proceedings." *Strickland*, 466 U.S. at 693–694. Ineffective assistance litigation is a heavy burden on the criminal justice system. *Strickland*, 466 U.S. at 690. To place some limits on the proliferation of such claims, *Strickland's* standard for judging the reasonableness of the attorney's conduct must be precisely and narrowly construed. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690.

The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms", not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S. at 690.

Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Strickland*, 466 U.S. at 688.

In giving shape to the perimeters of the range of reasonable professional assistance, *Strickland* mandates that the "[prevailing] norms of practice as reflected in American Bar Association Standards and the like... are guides to

determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688. Contrary to Petitioner's assertion, these guidelines are not inexorable commands with which all defense counsel must fully comply. *Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009).[6] This is evident even in the preamble to the Washington Standard for Indigent Defense:

> The Court adopts additional Standards beyond those required for certification ***as guidance for public defense attorneys*** in addressing issues identified in *State v. A.N.J.*, 168 Wash. 2d 91, 225 P.3d 956 (2010)...(emphasis added).

WA R STDS INDIG DEF Preamble.[7]

The State Supreme Court recognized that opinions can differ regarding whether a defendant's interests are best served by one strategy or another. The decision, therefore, of what strategy to pursue must rest exclusively in trial counsel. *State v. Mode*, 57 Wash. 2d 829, 833, 360 P.2d 159 (1961). Counsel is also entitled, in the exercise of his professional talents and knowledge, to decide whether to lodge an objection. *State v. Lei*, 59 Wash. 2d 1, 6, 365 P.2d 609

---

6 To support his argument of SID non-compliance, Petitioner makes several assertions that are unsupported by the record. For example, Petitioner claimed that counsel did not satisfy the time requirement of the SID. See COA Opinion, pg. 6, fn 2. Petitioner also claimed that MacDougal and Prince did not assist counsel at trial. See COA Opinion, pg. 11, fn 3.

7 Petitioner argues that any violation of the SID should result in a per se finding of ineffective assistance of counsel. However, as the Court of Appeals noted, this would effectively impose a higher standard of representation for indigent defendants that the Sixth Amendment requires for retained counsel. COA Opinion, pg. 14-15. Petitioner also erroneously tries to analogize the SID to the requirements for representation on capital cases by citing to a South Carolina case. Petition, pg. 12. However, Petitioner fails to recognize the Washington standard in SPRC 2, which provides an exception to appointing counsel from the list, by allowing the court to appoint otherwise qualified counsel. If one were to accept Petitioner's argument, the courts would arguably have more latitude in appointing counsel in death penalty cases under SPRC 2, than appointing indigent defense counsel under the SID.

(1961). Even when counsel's decisions, in retrospect, appear to have been errors in judgment or trial strategy, incompetence is not established. *Lei*, 59 Wash. 2d 1; *Mode*, 57 Wash. 2d at 833 (Mistakes or errors of judgment do not establish the violation of a constitutional right.). It is only when the incompetence or neglect of a lawyer, either appointed or employed to defend one charged with crime, reduces the trial to a farce is the constitutional right violated. *Mode*, 57 Wash. 2d at 833.

Ineffective assistance claims are judged by the same standard whether counsel is retained or appointed. *See Cuyler v. Sullivan*, 446 U.S. 335, 344–345, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

Petitioner argues that the Court should reject its reliance on the *Strickland* standard and replace it with a completely opposition presumption, in which any deviation from the Standards of Indigent Defense guidelines creates a presumption that the attorney was not competent. The State Supreme Court rejected a similar assertion in *In re Gomez*, 180 Wash. 2d 337, 351–52, 325 P.3d 142, 149–50 (2014). The *Gomez* court reiterated *Strickland's* positon that prevailing professional standards may serve as guides for determining what is reasonable but may not serve as a checklist for evaluating attorney performance. *See*, *In re Gomez*, 180 Wash. 2d at 351 (rejecting argument the attorney fell below

objective standard where attorney's experience roughly met the prevailing professional standard).[8]

The standards are merely guidelines and do not create a new presumption of ineffective assistance of counsel.[9] This is also apparent from the fact that the guidelines do not apply to all attorney's representing defendants in felony criminal matters, but only public defense attorneys. To find otherwise would negate the *Strickland* standard in only a unique subset of cases.[10]

To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that but for counsel's performance, the

---

8 The request to abandon the decades-long adherence to Strickland's presumption of competency should *also be denied under the doctrine of stare decisis. Under this doctrine, this Court will reverse itself on an established rule of law only upon a showing that the rule is incorrect and harmful. State v. Ray, 130 Wash. 2d 673, 678, 926 P.2d 904 (1996). A decision is harmful when it has a detrimental effect on the public interest. State v. Siers, 174 Wash. 2d 269, 276, 274 P.3d 358 (2012).*

9 The *Strickland* court appropriately stated: The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. *Strickland*, 466 U.S. at 690.

10 Similarly, any argument that the use of the guidelines as the standard for effective assistance of counsel is consistent with the Supreme Court's inherent power to maintain appropriate standards of professional conduct, ignores the fact that the Court has previously indicated that violations of Rules of Professional Conduct should be addressed through the disciplinary process rather than as a basis for relief in criminal matters. *See, State v. Lord*, 117 Wash. 2d 829, 887, 822 P.2d 177 (1991) (denying the defendant's motion to reverse the conviction and stating that "the remedy for a claimed violation of the RPC is a request for discipline by the bar association").

result would have been different." *State v. McNeal*, 145 Wash. 2d 352, 362, 37 P.3d 280 (2002). The failure to establish *either* prong of the test is fatal to an ineffective assistance of counsel claim. *State v. Johnson*, 189 Wash. App. 1046 (2015); *Strickland*, 466 U.S. at 700.

The totality of the evidence presented in the case does not support a claim of ineffective assistance. Petitioner complains about the length of cross. Defense counsel generally conducted more sustained cross-examination of Mr. Weitman and Faith Flores than of law enforcement officers. The decision to not attempt extensive cross a law enforcement witness testifying about objective observations, is a valid trial decision to avoid providing the opportunity for more damaging testimony or subjective observations to be admitted.

Petitioner also complains about lack of objections to alleged leading questions. Even if questions are leading, the decision not to object is also a tactical decision, especially when the evidence would likely be admitted by rephrasing the question, the answered expanded, and evidence reinforced.

Courts are reluctant to find ineffective assistance of counsel except in the most extreme cases. Scrutiny of counsel's performance is highly deferential and courts must indulge in a strong presumption of reasonableness. *State v. Thomas*, 109 Wash. 2d 222, 226, 743 P.2d 816 (1987). This is particularly true where, as here, the alleged deficient performance consists of an attorney's failure to object. The decision of when or whether to object is a classic example of trial tactics.

Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wash. App. 754, 763, 770 P.2d 662 (1989). Further, "[w]here a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained". *State v. Fortun-Cebada,* 158 Wash. App. 158, 172, 241 P.3d 800 (2010).[11]

Petitioner cannot show that hypothetical objections would have been sustained. Even if defense counsel in this case had objected, proper grounds to admit the evidence existed. *See Brief of Respondent*, Sec. C, 1(a) and 1(b) for detailed argument regarding admissibility. See also, COA Opinion, pg. 17.

2. Inability to call impeachment witnesses did not support a claim of ineffective assistance.

Petitioner also argues trial counsel's failure to question the victim about previous statements was ineffective assistance of counsel. As discussed above, there is no basis to support a finding of ineffective assistance. Counsel's reliance on *State v. Horton*, 116 Wash. App. 909, 68 P.3d 1145, 1152 (2003) was misplaced. In *Horton,* the court found defense counsel could have defused a statement elicited

[11] Petitioner cites to *State v. Neidigh*, 78 Wash. App. 71, 77, 895 P.2d 423, 428 (1995), but that case further undercuts their argument. If the failure to object could have been legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance. *See Neidigh*, 78 Wash. App. at 77–78 (defense counsel's failure to object to clearly improper questions on cross of defendant may have been strategic, and counsel may have concluded that it was preferable to let the jury hear the confident answers rather than to stop the questions).

from the victim by presenting evidence of earlier inconsistent statements not to one, but to two, persons whose credibility would have been hard to assail (i.e. a neutral CPS investigator, and the victim's long-time friend). *Horton*, 116 Wash. App. at 922.

That is far from the circumstances in the present case. The victim testified he told Michaela Flores he would probably not show up in court. Defense initially indicated to the court that they did not intend to call the witness Michaela Flores for impeachment purposes. Unlike in *Horton*, the defendant's wife would not have been unassailable. Her alleged allegations were not credible in light of the testimony from the victim, Faith Flores, Sandra McCorkle, Jesse Flores; or in light of the defendant's attempt to construct an alibi witness through Jana Mason.

Moreover, the victim indicated to police at the time of the incident, and at trial, that Jesse Flores was the person who pulled the knife and was the one who inflicted the stab wound. On cross exam, the victim said that Jesse was aggressive to him on the phone prior to the attack, and John Flores was not aggressive when he spoke with him on the phone. RP 207-208.

The allegations attributed to Ms. Flores for potential impeachment, would have been of minimal evidentiary value even if found admissible, and would not have addressed the defendant's clear culpability as an accomplice in the crimes.[12]

[12] Arguably, where accomplice liability is asserted, a claim that the defendant "didn't do it" would be an impermissible legal conclusion under ER 701.

Similarly, the proposed statement from Mr. Gains was found not to be inconsistent with the testimony of the victim. It was not proper impeachment.

Although the defense attempt to present impeachment evidence did not proceed as anticipated, it does not give rise to a finding of ineffective assistance of counsel.

3. Any claimed errors were harmless based on the overwhelming evidence.

An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wash. 2d 793, 808, 92 P.3d 228 (2004). If error is not one of constitutional magnitude, reversal is not required unless the defendant can show that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Roche*, 75 Wash. App. 500, 509, 878 P.2d 497, 502 (1994) (quoting *State v. Ray*, 116 Wash. 2d 531, 546, 806 P.2d 1220 (1991); *State v. Smith*, 106 Wash. 2d 772, 780, 725 P.2d 951 (1986)).

Even if the Court of Appeals had found error, the evidence was so overwhelming that it would lead to a finding of guilt. Here the defendant was alleged to have acted as a principal or accomplice. Even fully accepting the defendant's theory of the case the defendant was guilty as an accomplice. The defendant encouraged, requested, and/ or aided Jesse Flores and Faith Flores in

planning and committing the crime, with knowledge that it would promote or facilitate the crime. The defendant told the victim he was coming to "talk" to him, he arranged transportation to and from the crime scene, knew Jesse Flores possessed and threatened the victim with a knife before stabbing him, and prevented the victim from escaping until he had given up his property. Those facts established more than mere presence. However, the totality of evidence presented at trial went far beyond those facts conceded by defense. Any claimed error was harmless.

D. CONCLUSION

The defendant has not established his claim of ineffective assistance of counsel, based on SID guidelines or the failure to object to questioning or to admit testimony not supported by the rules of evidence. The Petitioner's convictions should be affirmed.

Dated this 2nd day of February 2017

Respectfully Submitted by:

KARL F. SLOAN, WSBA #27217
Attorney for Respondent

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 2nd day of February, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Response to Petition for Discretionary Review:

E-mail: gaschlaw@msn.com

David N. Gasch
Gasch Law Office
P. O. Box 30339
Spokane, WA 99223-3005

Email: rcboru@aol.com

Robert Charles Boruchowitz
Seattle University School of Law

S. Field

Shauna Field, Legal Assistant

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290