Supreme Court No. 99784-5
(COA No. 80538-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RASHIED MITCHELL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Rashied Mitchell, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Mitchell seeks review of the Court of Appeals decision dated April 19, 2021, attached here as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it did not replace Mr. Mitchell's attorneys because the breakdown in communication prevented Mr. Mitchell from receiving a meaningful defense?

2. Did the trial court err when it did not grant Mr. Mitchell's motion for a new trial, based on the ineffective assistance of his attorneys?

D. STATEMENT OF THE CASE

In the weeks before shooting Tabitha Apling, Rashied Mitchell's mental health deteriorated. He was taking painkillers for pain, and because this was not enough, he was self-medicating with alcohol. RP 963-64.[1] Twice, people called the police, worried he was going to kill himself. RP

[1] The transcripts are largely sequential, except for dates not involving Mr. Mitchell's trial. For references to those transcripts, the date of hearing is included.

992, 994. Both times, the police declined to commit Mr. Mitchell, believing they lacked cause for the commitment. RP 500.

Mr. Mitchell had been greatly affected by his estrangement from Ms. Apling, with who he had been living and had two children. RP 992. Despite the no-contact order issued after Mr. Mitchell's arrest in an unrelated case, Ms. Apling and Mr. Mitchell continued to have contact. RP 959, 977. Ms. Apling visited the house where Mr. Mitchell was staying with his mother, Rene Mitchell, who watched their children. RP 981, 958.

On the night of the incident, Mr. Mitchell asked Ms. Apling to speak with him when she came to pick up the children after her work shift. RP 941. She agreed. RP 1002.

When Ms. Apling arrived, Mr. Mitchell began to talk calmly with Ms. Apling. RP 1005. Soon after, Mr. Mitchell took out his firearm and pointed at his head. RP 1007. Ms. Apling then pulled on the gun, trying to take it from him. *Id*.

When Mr. Mitchell heard that someone called 911, he became angry. RP 1013. Mr. Apling and Mr. Mitchell wrestled with the gun, moving towards a closet. *Id*. In the closet, Mr. Mitchell's firearm discharged, killing Ms. Apling. *Id*.

Ms. Mitchell did not witness the shooting. She left the house right after the shot was fired. RP 1014. Right after the shooting, Ms. Mitchell

told the police Mr. Mitchell and Ms. Apling fell into the closet together immediately before the fired shots. CP 777.

Soon after Ms. Mitchell spoke to the police, the police heard a second gunshot. RP 465-66. Mr. Mitchell then appeared from the building with a bullet wound to his head. RP 496.

Mr. Mitchell was taken to the hospital with a self-inflicted injury. RP 610-11. While still heavily medicated, an officer came to the hospital to take Mr. Mitchell's statement. RP 887-88. Mr. Mitchell denied intentionally killing Ms. Apling. *Id*. The court held a hearing to determine the admissibility of this statement, but Mr. Mitchell's lawyer did not challenge its admissibility. 5/20/19 RP 7, 31.

The government charged Mr. Mitchell with murder in the first degree, murder in the second degree, and other crimes. CP 43-47. After an earlier attorney from the public defender's office was removed, Kenan Isitt and Jason Moore represented Mr. Mitchell for his trial.

Early in Mr. Mitchell's trial, Mr. Mitchell complained of the lack of communication with his attorneys, along with his belief Mr. Isitt was not following a coherent and agreed strategy in representing him. RP 536. He asked for his lawyers to be relieved. *Id*. The court heard Mr. Mitchell's concerns but declined to appoint new counsel. RP 544.

Mr. Mitchell brought his concerns to the court again, orally and in writing. RP 1101-02, CP 215, 222, 225. Mr. Mitchell complained about a lack of work to support a mental health defense and told the court his lawyers would not listen to him about trial strategy. *Id*. He believed his attorneys had "wasted every opportunity" they had to defend him. RP 1104. Again, the court denied Mr. Mitchell's motion. RP 1105-06.

Mr. Mitchell's lawyers did very little to examine the government's evidence. In a trial transcript of over 1,300 pages, cross-examination constituted less than 21 pages. In contrast, the prosecutor's direct examination of the witness is approximately 546 pages of the transcript. Defense counsel did not present a case.

Witness	**Approximate Cross-examination Length**	**RP**
Kati Cochran	No cross-examination	441
Ofc. Travis Stevens	No cross-examination	455
Ofc. R.B. Blackshear	2 pages	484
Ofc. Anders Wiggum	2 pages	550
Ofc. Michael Henrich	1 page	573
Jason Guy, EMT	1 page	601
Det. Adam Howell	No cross-examination	638
Det. Jeffrey VanderVeer	1 page	662
Det. Michael Coffey	No cross-examination	762
WSP Tech Rick Wyant	No cross-examination	788
Adam Howell	No cross-examination	857
Elina Mitchell	9 pages	954
Ofc. Michael Mabis	No cross-examination	1056
Det. Adam Howell	3 pages	1075
Dr. Richard Harruff	3 pages	1110

In closing arguments, defense counsel relied on an accident defense. Defense counsel argued the firearm accidentally discharged while Ms. Apling struggled to get it away from Mr. Mitchell, who was trying to shoot himself. RP 1262. Because they were falling, the discharge was unintentional. RP 1260.

The prosecutor responded to this argument by stating no evidence suggested Mr. Mitchell and Ms. Apling ever fell into the closet together. RP 1271. The prosecution also pointed out that when Ms. Mitchell was asked this question, she told counsel they had not fallen into the closet. *Id*.

Mr. Mitchell was convicted as charged. 6/13/2019 RP 75. After the trial, new counsel brought a motion asking for a new trial because Mr. Mitchell received ineffective assistance at his trial. 7/11/19 RP 87.

New counsel identified deficiencies in trial counsel's investigation and trial performance. 9/16/19 RP 165. Counsel argued the trial lawyers were ineffective because they investigate mental health or voluntary intoxicate defenses. CP 596. In a declaration, an expert hired by earlier counsel stated she believed diminished capacity applied. CP 774.

The motion also alleged the retained experts were not called because trial counsel believed Mr. Mitchell had to admit to firing the pistol. CP 597, 599. Further, counsel failed to introduce evidence critical to the theory that discharge of the firearm was accidental. CP 601.

In its reply to the motion for a new trial, the prosecution stated defense counsel had consulted with two other experts on the diminished capacity issue, other than Dr. Gerlock. CP 293. Dr. Richard Adler, one of these experts, disputed this statement. CP 792.

The trial court denied the motion. 9/16/19 RP 201. Mr. Mitchell was sentenced to 720 months. 9/16/19 RP 236.

E. ARGUMENT

1. This Court should review whether the breakdown in communication between Mr. Mitchell and his attorneys deprived Mr. Mitchell of his right to conflict-free counsel.

The Court of Appeals held the trial court did not abuse its discretion when it denied Mr. Mitchell's motion for new counsel because of his breakdown in communication with his attorneys. App. 19. This Court should accept review of whether the breakdown in communication between Mr. Mitchell and his attorneys and their irreconcilable conflict deprived Mr. Mitchell of his right to conflict-free counsel. This issue satisfies RAP 13.4(b) as it involves a significant question of constitutional law and an issue of substantial public interest.

At trial, Mr. Mitchell alleged an irreconcilable conflict. An irreconcilable conflict of interest occurs where a serious breakdown in communication results in an inadequate defense. *United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2002) (citing *United States v. Musa*, 220 F.3d

1096, 1102 (9th Cir.2000)). Where such a conflict is alleged, the trial court's discretion to deny a motion for substitution of counsel must be balanced against the accused's Sixth Amendment right. *Id*; U.S. Const. amend. VI, Const. art. I, § 22.

To determine whether there is an irreconcilable breakdown in communication, the court looks to the extent of the conflict, the adequacy of the inquiry, and the timeliness of the motion. *In Re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). A trial court's abuse of discretion occurs when a court's ruling is based on facts that are not supported by the record, an incorrect understanding of the law, or an unreasonable view of the issues presented. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

While the Court of Appeals disagreed, Mr. Mitchell made clear in his motion the extent of his conflict. He told the court his lawyers had not reviewed discovery with him and only asked him days before his trial whether there were witnesses they should call. RP 533. Mr. Mitchell also raised concerns about the lack of investigation into his mental health. RP 533. He alleged he would be evaluated, but this never occurred. RP 536, 35. He had no agreed strategy with his lawyers. RP 536.

Mr. Mitchell's lawyers did not deny the breakdown. His lead lawyer agreed there was a "nearly complete breakdown" in

communication. RP 547. While his second lawyer could communicate with Mr. Mitchell, this relationship would later completely deteriorate. *Id*., 7/11/19 RP 96. The trial court denied Mr. Mitchell's motion to discharge his attorney. RP 544.

Mr. Mitchell renewed his motion after trial commenced. RP 1101-02, CP 215, 222, 225. He told the court that every chance there was to cross-examine witnesses seemed to be missed. *Id*. Especially concerning for Mr. Mitchell were omissions in the cross-examination of the lead detective and Ms. Mitchell, his mother. *Id*. Importantly, Ms. Mitchell made a statement at trial inconsistent with her statement right after the shooting had occurred. *Id*., CP 777. Despite it being critical to his defense, Mr. Mitchell's attorneys did not attempt to correct or challenge Ms. Mitchell's inaccurate statement. RP 1101-02. The trial court again denied Mr. Mitchell's motion. RP 1105.

The court should have granted Mr. Mitchell's motions. When Mr. Mitchell brought his motion for a new lawyer, it was out of desperation. His lawyers had done little to prepare the case, especially the mental health defenses Mr. Mitchell felt applied. RP 533. Mr. Mitchell's attorneys had met infrequently with him and had not done what appeared to be an adequate investigation. *Id*. Because of these failures, communication between Mr. Mitchell and his attorneys had broken down.

The court's inquiry was not enough. To determine what is required, this Court can look to *Nguyen*, 262 F.3d at 1001. In *Nguyen*, the defendant complained his attorney was rude and rarely talked to him. *Id*. Defense attorney responded by telling the court he met with the defendant several times, and he was prepared for trial. *Id*. The court did not further inquire into the defendant's complaints. *Id*. During the trial, defense counsel told the court that his client would no longer speak with him. *Id*. The court informed the defendant that his lawyer was representing him adequately, and it would not relieve his attorney. *Id*.

The Ninth Circuit found this inquiry insufficient. *Nguyen*, 262 F.3d at 1003. By limiting its inquiry into whether the attorney and client had met to discuss the case and whether the attorney was prepared to proceed, the court did not sufficiently seek information about the nature of the problem. *Id*. at 1005.

While the Court of Appeals disagreed, based on the record made by Mr. Mitchell, the trial court should have made a deeper inquiry and discharged his attorneys. Mr. Mitchell's attorneys were not prepared for trial. The investigation into mental health defenses was minimal. They operated under the mistaken belief Mr. Mitchell needed to testify to present a mental health defense. RP 833. The expert engaged by previous counsel was not consulted, who would have told counsel Mr. Mitchell had

a valid diminished capacity defense. CP 774. Defense counsel had little idea of whether defense witnesses even existed, asking Mr. Mitchell who they should call days before trial. RP 533.

The Court of Appeals found no conflict. App. 19. Instead, Mr. Mitchell asks this Court to adopt the analysis in *Nguyen*, 262 F.3d at 1005. By the time Mr. Mitchell asked for a new lawyer, the attorney-client relationship had deteriorated completely. Mr. Mitchell had reasonable grounds for losing trust and confidence in his attorneys. The court's failure to provide him with a new lawyer requires warranted new counsel. This Court should review whether this error requires reversal.

2. This Court should review whether the trial court erred when it did not grant Mr. Mitchell's motion for a new trial based on defense counsel's failure to provide him with effective and competent representation.

The Court of Appeals found that Mr. Mitchell's trial counsel conducted a reasonable investigation into defense theories, chose a reasonable trial strategy, and made reasonable strategic decisions about cross-examination. App. 14. This Court should accept review because the record does not support these findings. Instead, counsel's failure to provide Mr. Mitchell with an adequate defense included the failure to research or investigate viable mental health defenses or diminished capacity, and the failure to introduce evidence critical to their defense

theory. This deficient performance resulted in ineffective assistance for Mr. Mitchell and compromised his right to a fair trial. This issue satisfies RAP 13.4(b) as it involves a significant question of constitutional law and an issue of substantial public interest.

a. Mr. Mitchell had the right to effective assistance of counsel.

Mr. Mitchell was entitled to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). Effective assistance "entails certain basic duties," including the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *In re Pers. Restraint of Tsai*, 183 Wn.2d 91, 99-100, 351 P.3d 138 (2015).

An attorney renders constitutionally inadequate representation when there is no legitimate strategic or tactical reason for conduct that prejudices the accused. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). Even if counsel has a strategic or tactical reason for certain actions, the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

b. Mr. Mitchell's attorneys failed to research, investigate, or support their trial strategy, depriving Mr. Mitchell of his right to effective assistance of counsel.

Here, the lack of research, investigation, and trial strategy were not reasonable. *State v. Fedoruk*, 184 Wn. App. 866, 880–81, 339 P.3d 233 (2014). To meet the constitutional requirements for effective assistance, Mr. Mitchell had the right to a complete investigation of his case. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015); *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Trial counsel must also also research and apply relevant law. *State v. Kyllo*, 166 Wn.2d 856, 868, 215 P.3d 177 (2009). Where a trial strategy is based on an inadequate investigation or incomplete research, ineffective assistance occurs. *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

i. Failure to research, investigate, or present a diminished capacity defense.

The Court of Appeals held defense counsel's investigation of diminished capacity was adequate. App. 9. This Court should accept review of this finding, as Mr. Mitchell was deprived of effective assistance because of his counsel's failure to investigate, research, and present a diminished capacity defense.

Diminished capacity is established "whenever there is substantial evidence of such a condition and such evidence logically and reasonably connects the defendant's alleged mental condition with the inability to

possess the required level of culpability to commit the crime charged." *State v. Cienfuegos*, 144 Wn.2d 222, 227–28, 25 P.3d 1011 (2001) (quoting *State v. Griffin*, 100 Wn.2d 417, 419, 670 P.2d 265 (1983)).

Mr. Mitchell's original lawyers hired Dr. April Gerlock to assess Mr. Mitchell for "mental health disorders and the impact of those disorders on his behaviors and decisions in the weeks leading up to the event." CP 769. Dr. Gerlock found Mr. Mitchell suffered from "a recurrent, severe major depressive disorder, severe post-traumatic stress disorder, generalized anxiety disorder, and an unspecified psychotic disorder with paranoia." CP 774. Dr. Gerlock also found Mr. Mitchell's "judgment was impaired by substance abuse and depression, and his reactivity and impulsivity to the situation were also intensified by the substance abuse and co-occurring PTSD symptoms." *Id*.

Mr. Mitchell's trial lawyers did not speak to Dr. Gerlock, although he claimed he did. CP 319. Dr. Gerlock stated no such conversation occurred. CP 774. Counsel believed that because Mr. Mitchell would not admit to pulling the trigger, such a defense was a "non-starter." 9/20/19 RP 153. Likewise, Mr. Mitchell's trial lawyers claimed they spoke to Dr. Adler, another expert, about the diminished capacity defense. 9/20/19 RP 153. Dr. Adler declared he did not render any definitive opinion about diminished capacity and would not have told him the defense required Mr.

Mitchell's testimony. CP 791. Dr. Adler's declaration did not support trial counsel's statement.

Where an attorney makes strategic choices "after less than complete investigation," a reviewing court will consider them reasonable only "to the extent that reasonable professional judgments support the limitations on investigation." *Fedoruk*, 184 Wn. App. at 880–81 (quoting *Strickland*, 466 U.S. at 690–91). Here, the potential defense experts stated their opinions would have supported a diminished capacity defense. At the least, their opinions required an investigation into whether this was true, which did not occur. *Fedoruk*, 184 Wn. App. at 885.

This Court should also be concerned about the inconsistent statement defense counsel provided once the investigation into his work began. Basing his decision on this "non-starter" was not reasonable. The failure to mount a diminished capacity defense for defense counsel's stated reasons was unreasonable and deficient performance.

ii. Failure to research, investigate, or present evidence of voluntary intoxication.

The Court of Appeals found the record was unsupportive of Mr. Mitchell's claim of voluntary intoxication. App. 11. But this is not because there was evidence, but because Mr. Mitchell's lawyer failed to present it

effectively. This Court should grant review because of defense counsel's deficient performance and their failure to establish this defense.

A voluntary intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the required mental state. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). A voluntary intoxication instruction should be provided when the crime includes a mental state, substantial evidence of intoxication, and there is evidence the intoxication affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992).

Before trial, trial counsel retained Dr. Robert Julien, a psycho-pharmacology expert, to "review police and medical records as well as interview Mitchell and opine on any possible contribution of these substances on his ability to form the intent to commit the actions that resulted in Ms. Apling's death." CP 630. Dr. Julien was not asked to opine on whether the substances Mr. Mitchell took affected Mr. Mitchell's ability to form the intent to commit the crimes charged. Even so, Dr. Julien wrote in his report that "Certainly "intent" to injure was impaired by his state of intoxication." CP 633.

Counsel did not interview Dr. Julien until just before trial. When notifying the court of their intent conducting the interview, counsel stated

it was not to mount a voluntary intoxication defense but to determine whether Mr. Mitchell was competent. 5/20/19 RP 35. Dr. Julien was not a good witness, largely because of personal issues. CP 594. Counsel decided not to call him, but did not seek out another expert to support an intoxication defense.

Judging the suitability of a witness immediately before a trial is unreasonable. *Fedoruk,* 184 Wn. App. at 883. If Dr. Julien was not going to be a good witness, the decision is not to waive the defense his testimony might establish, but to engage a different expert. This decision should have been made well before trial.

And while the Court of Appeals disagreed, there was ample other evidence of intoxication. Mr. Mitchell was using oxycodone and fentanyl to deal with his pain and had consumed a significant amount of alcohol. RP 963-64. Also, Dr. Gerlock observed that Mr. Mitchell had consumed duloxetine (anti-depressants), oxycodone (pain), propranolol (migraines), fentanyl (pain), and zolmitriptan (migraines). CP 773. And while defense counsel argued Mr. Mitchell was not slurring when the shooting occurred, Dr. Julien explained that people with tolerance sometimes appear "less drunk" than others. CP 627.

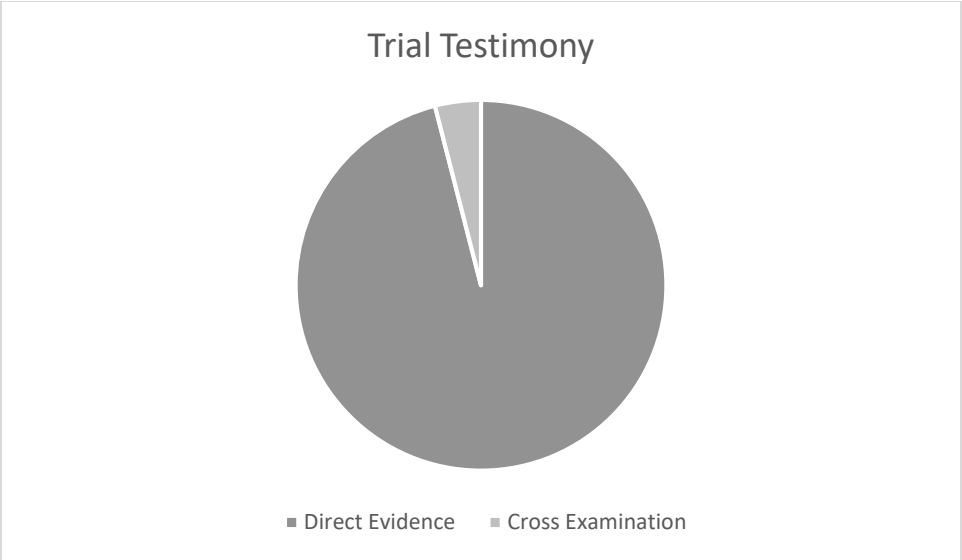
Further, defense counsel was wrong that Mr. Mitchell needed to testify to use the voluntary intoxication defense. Evidence of voluntary

intoxication need not come from the defense, let alone the person on trial. See, e.g., *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003).

Mr. Mitchell's lawyer needed to understand and investigate voluntary intoxication. *Fedoruk*, 184 Wn. App. at 880–81. The evidence available to him at trial was ample. To the degree counsel was unhappy with how their expert, defense counsel needed to hire a different one. Because counsel's reasoning for not raising the voluntary intoxication was based on a flawed analysis, it was not reasonable, not strategic, and not entitled to deference. *Id*. It constituted ineffective assistance.

iii. Failure to introduce critical evidence at trial.

The Court of Appeals disagreed that the failure to provide cross-examine the witnesses on critical evidence was ineffective assistance. App. 11. Defense counsel's deficiency in not cross-examining Ms. Mitchell should be viewed in the light of their overall deficient performance. Less than 4% percent of the testimony involved cross-examination. This is concerning on its own, but especially troublesome in light of the other decisions trial counsel made, like not interviewing or finding suitable experts to mount a reasonable defense.



This Court must be concerned, where trial counsel did so little, whether the result of Mr. Mitchell's trial is "unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *In re Crace*, 174 Wn.2d 835, 844, 280 P.3d 1102 (2012) (quoting *Strickland*, 466 U.S at 696).

The support for the accidental shooting defense came from Ms. Mitchell, Mr. Mitchell's mother. When asked at trial whether Mr. Mitchell and Ms. Apling fell into the closet, Ms. Mitchell mistakenly said, "no, they didn't fall." RP 1271. Having staked the entire defense on this issue, counsel had a duty to correct this error. Counsel did not try with Ms. Mitchell's prior statements they she saw them fall. CP 777. Where no benefit from an action or failure to act would accrue to the defense,

counsel's action cannot be characterized as a reasonable trial strategy. *State v. Horton*, 116 Wn. App. 909, 920, 68 P.3d 1145 (2003).

In closing arguments, defense counsel focused on how Mr. Mitchell and Ms. Apling fell. RP 1270. But in rebuttal, the government properly argued the evidence did not support this defense. RP 1271. Left without a defense, no possible benefit accrued from the failure to establish the fall. The failure to construct this case, especially after other defense had been abandoned, constituted deficient performance.

c. Because the ineffective assistance prejudiced Mr. Mitchell, this Court should grant review.

Defense counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Lopez*, 190 Wn.2d at 115–16 (quoting Tsai, 183 Wn.2d at 99). "'In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.'" *Crace*, 174 Wn.2d at 844 (quoting *Strickland*, 4366 U.S. at 696). The decisions of trial counsel deprived Mr. Mitchell of his right to effective assistance of counsel. Had Mr. Mitchell received the assistance he deserved, there is a reasonable probability the outcome of the trial would have been different. This Court

cannot be confident Mr. Mitchell's attorney provided representation sufficient to produce a just result. For that reason, Mr. Mitchell asks this Court to grant review.

F. CONCLUSION

Based on the preceding, Mr. Mitchell respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 20th day of May 2020.

Respectfully submitted,

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APPENDIX

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FILED
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Court of Appeals
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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. RASHIED MACEO MITCHELL, Appellant.	)	No. 80538-0-I UNPUBLISHED OPINION

VERELLEN, J. — Rashied Mitchell was convicted of first degree murder following a jury trial. Mitchell was represented by two defense counsel. Following trial, Mitchell received substitute defense counsel and made a motion for a new trial, arguing his trial counsel provided ineffective assistance. The court denied the motion. Mitchell makes the same arguments on appeal. Because the record shows his trial counsel chose a legitimate, reasonable trial strategy and pursued it using reasonable tactics, Mitchell fails to establish defense counsel's performance was deficient and ineffective. The court did not abuse its discretion by denying his motion for a new trial.

Mitchell also argues he received ineffective assistance because the trial court denied his motions for substitute defense counsel. Because Mitchell made his motions after trial began, was able to communicate with counsel, and disagreed over only trial strategy and tactics, he fails to establish the trial court abused its discretion by denying his motions for substitute defense counsel.

Therefore, we affirm.

FACTS

In mid-September of 2016, Tabitha Apling obtained a domestic violence protection order against her boyfriend Rashied Mitchell after an incident at a fast food restaurant. Mitchell was not allowed to have contact with Apling or their sons, then five years old and seven months old, respectively. Mitchell went to live with his mother Renee[1] in her one-bedroom apartment. Apling still wanted Mitchell to see his sons, however, and she relied on Renee for childcare when she was working. Mitchell was struggling emotionally, and at least twice in two weeks, Renee and others called the police after he posted suicidal comments online.

Between September 13 and September 24, Mitchell sent Apling 780 text messages. On September 16, he texted, "You don't realize you have broken me and all of this has gone too far until I'm looking you in your eyes. . . . You can only kick a pit so many times before they lash out and bite."[2] On September 24, Mitchell texted Apling, "It's past fun and games now because I will take my life. . . . I'm going crazy and I'm not stable. . . . I have reached way over my limit where now my sanity is really being affected."[3] Apling was afraid to see Mitchell, but because Renee would be home that night, she agreed to speak with him when picking up the kids after work.

[1] Because Elina Renee Mitchell and her son have the same last name, we refer to Renee by her preferred name.

[2] Report of Proceedings (RP) (June 6, 2019) at 937.

[3] Id. at 919.

Renee saw nothing out of the ordinary with her son when Apling arrived after 10:00 p.m. Mitchell sounded calm when they began talking. Renee was lying down in her bedroom with her seven-month-old grandson. Her older grandson was in the living room with his parents, playing video games. The older grandson soon came running to the bedroom, crying because his "dad had a gun."[4] Renee got up and saw Mitchell walking down the hallway with a handgun pointed at his head. She recognized the gun as her son's because she asked him to get rid of it only a few weeks earlier, and he said he had. Apling was pulling on the gun, trying to get it away from Mitchell's head. Renee took her older grandson into her bedroom, where her younger grandson had fallen asleep, and threw a comforter over him to block his view.

Mitchell told Renee, "Mom, if you call [911], I'm going to shoot [myself and Apling]."[5] Despite his threat, Renee called 911 because Apling asked her to. Mitchell learned 911 had been called and said to Apling, "It's over now. . . . You called the police on me. . . . You called the police. . . . You called the police."[6] Apling said, "Nobody called. Nobody called."[7] Renee saw Mitchell and Apling "wrestling" for the gun, fall over a glass table in the bedroom, and enter the bedroom closet while still wrestling to get the gun.[8] Renee heard a gunshot.

[4] RP (June 10, 2019) at 1006.

[5] Id. at 1010-11.

[6] Ex. 12, at 4.

[7] Id.

[8] RP (June 10, 2019) at 1013.

Mitchell came out of the closet crying and trying to shoot himself in the head, but the gun kept misfiring. Mitchell looked at Renee and said, "Go, Mom!"[9]

Renee ran out the door with the children and to the Federal Way police officers who had just arrived in the parking lot outside. Renee told an officer that her son was arguing with his girlfriend, he had a gun, they were wrestling over it, she heard a gunshot, and she could no longer hear Apling's voice. Inside the apartment, Mitchell placed the gun beneath his jaw and pulled the trigger. Officers outside heard the shot and used their loudspeakers to order Mitchell out of the apartment. He complied, crawling out of the apartment where medics treated and then took him to the hospital. Officers found Apling's body inside the closet. She was killed by a single, close-range gunshot that entered her left, upper back and passed down through her heart.

Mitchell was charged with first and second degree murder, both with domestic violence enhancements and a firearm enhancement. He was also charged with four domestic violence felony violations of a no-contact order and one count of unlawful possession of a firearm.

About one year later in August of 2017, Mitchell moved to dismiss his two assigned defense counsels, arguing he lacked confidence in them because they were inexperienced and had not communicated sufficiently with him. The court denied his motion. In October of 2017, Mitchell again moved to dismiss his attorneys, and the court denied his motion. On April 24, 2018, one month before

[9] RP (June 10, 2019) at 1024.

Mitchell's trial was set, both defense counsel sought the court's permission to withdraw because Mitchell was unwilling to communicate with them, resulting in "a complete breakdown in communication."[10] The court granted the motion and ordered the appointment of substitute counsel. Mitchell's trial was continued.

Kenan Isitt associated as defense counsel in May of 2018. Jason Moore associated as defense co-counsel in November of 2018. They considered whether a diminished capacity defense was viable but decided against it. When trial began, Isitt and Moore planned on arguing the shooting was unintentional and resulted either from voluntary intoxication or from an accident when Apling tried to take the gun from Mitchell to stop him from killing himself. Over the course of trial, they decided to focus solely on the accident theory and not call their intoxication expert.

The State called multiple witnesses to testify, including Renee. On the third day of trial, Mitchell moved for dismissal of his defense counsel and appointment of substitute counsel. The court denied the motion. On the sixth day of trial, Mitchell again moved to substitute new defense counsel. The court denied the motion.

The jury found Mitchell guilty on all charges, including the enhancements.[11] One month later, Isitt and Moore sought permission to withdraw because they could no longer communicate at all with Mitchell. The court granted permission to

[10] RP (Apr. 24, 2018) at 45.

[11] The court granted the State's motion to vacate the second degree murder conviction on double jeopardy grounds.

withdraw, appointed new defense counsel, and scheduled a date to hear Mitchell's CrR 7.5 motion for new trial.

Mitchell argued a new trial was required because Isitt and Moore provided ineffective assistance by "fail[ing] to properly investigate or develop a diminished capacity defense, fail[ing] to properly investigate and prepare a voluntary intoxication defense, and fail[ing] to effectively cross examine" Renee.[12] The court heard oral argument, made findings of fact, concluded Isitt and Moore did not provide ineffective assistance, and denied the motion for a new trial. Mitchell was sentenced to 720 months' incarceration.

Mitchell appeals.

ANALYSIS

I. Motion for New Trial

We review a decision to deny a motion for a new trial for abuse of discretion.[13] A trial court abuses its discretion when its decision is based upon untenable evidentiary grounds or was made for untenable legal reasons.[14] We apply this deferential standard because "'the trial judge who has seen and heard

[12] Clerk's Papers (CP) at 592.

[13] State v. Hawkins, 181 Wn.2d 170, 179, 332 P.3d 408 (2014) (citing State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981)).

[14] State v. Berry, 129 Wn. App. 59, 68, 117 P.3d 1162 (2005) (citing State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989)).

the witnesses is in a better position to evaluate and adjudge than can we from a cold, printed record.'"[15]

Mitchell moved for a new trial under CrR 7.5(a)(8), which authorizes a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected . . . . (8) That substantial justice has not been done." As he did below, Mitchell argues a new trial is required because Isitt and Moore did not provide effective assistance of counsel because, first, they failed to research and investigate either a diminished capacity or voluntary intoxication defense, and second, they failed to adequately cross-examine the State's witnesses.

An allegation of ineffective assistance presents a mixed question of law and fact.[16] When the trial court's findings of fact are unchallenged, we treat them as verities.[17] We review the trial court's conclusions of law de novo.[18]

We presume defense counsel's performance was effective.[19] To demonstrate he received ineffective assistance, Mitchell must show both that counsel's performance was deficient and that the deficient performance caused

[15] Hawkins, 181 Wn.2d at 179 (quoting State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

[16] State v. Lopez, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (citing In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)).

[17] In re Davis, 152 Wn.2d 647, 679, 101 P.3d 1 (2004) (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)).

[18] Lopez, 190 Wn.2d at 117 (quoting Brett, 142 Wn.2d at 873-74).

[19] Davis, 152 Wn.2d at 673 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

prejudice.[20] "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options'" are generally not deficient.[21]

Mitchell argues a new trial was required because his counsel did not present viable defenses due to inadequate investigation. Effective assistance "'includes a "reasonable investigation" by defense counsel,'"[22] and can also include "'expert assistance necessary to an adequate defense.'"[23] The appropriate "'degree and extent of investigation required will vary depending upon the issues and facts of each case.'"[24]

The same judge that presided over the trial considered the motion for a new trial and made findings of fact in his oral ruling on the motion for a new trial.[25] Mitchell has not challenged those findings, making them verities.[26]

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[20] Lopez, 190 Wn.2d at 109 (citing In re Pers. Restraint of Canha, 189 Wn.2d 359, 377, 402 P.3d 266 (2017)).

[21] State v. Fedoruk, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (quoting Strickland v. Washington, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[22] Lopez, 190 Wn.2d at 116 (quoting State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007)).

[23] Id. (quoting State v. Punsalan, 156 Wn.2d 875, 878, 133 P.3d 934 (2006)).

[24] Fedoruk, 184 Wn. App. at 880 (quoting State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010)).

[25] Mitchell asserts the trial court did not make findings of fact. But the court's oral ruling expressly referred to making findings, RP (Sept. 20, 2019) at 202, and it was clearly making "'assertion[s] that a phenomenon . . . happened . . . independent of or anterior to any assertion[s] as to its legal effect.'" See Williams, 96 Wn.2d at 221 (defining "finding of fact") (quoting Leschi Improvement Council v. Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774 (1974)).

[26] Davis, 152 Wn.2d at 679.

The findings and the record do not support Mitchell's contentions. The trial court found Isitt and Moore "reviewed or investigated" several experts about the possibility of a diminished capacity defense.[27] It found that "[n]one of the witnesses that were investigated supported the idea that there was a diminished capacity" and that there was a "lack of medical support for the diminished capacity."[28] Regarding the voluntary intoxication defense, it "did not find that there was a nexus between the . . . intoxication and the actual crime for which Mr. Mitchell was convicted."[29] It found that the expert hired to evaluate and testify about the effects of voluntary intoxication on Mitchell's ability to form intent "was unable to opine on whether there was an intent."[30] And, based upon the trial record, it found "the accident defense was viable."[31]

The trial judge was in the best position to evaluate Mitchell's motion.[32] The court's findings about Isitt and Moore's performance are unchallenged and are supported by the record. "Once counsel reasonably selects a defense . . . 'it is not deficient performance to fail to pursue alternate defenses.'"[33] Thus, Mitchell fails

[27] RP (Sept. 20, 2019) at 198.

[28] Id. at 199, 201.

[29] Id. at 202.

[30] Id. at 199.

[31] Id. at 198.

[32] Hawkins, 181 Wn.2d at 179 (quoting Wilson, 71 Wn.2d at 899).

[33] Davis, 152 Wn.2d at 722 (quoting Rios v. Rocha, 299 F.3d 796, 807 (9th Cir. 2002)).

to prove that Isitt and Moore conducted an unreasonable investigation under the circumstances or did not present a viable defense.

Mitchell also argues defense counsel failed to research the relevant law for a voluntary intoxication defense because they believed Mitchell would have to testify. During a discussion in limine, Isitt explained "there would be no basis for a voluntary intoxication defense" if Mitchell did not testify.[34]

A defendant is entitled to a voluntary intoxication instruction when, among other requirements, there is substantial evidence of drinking and evidence that the drinking affected the defendant's ability to form the intent alleged.[35] Mitchell told the intoxication expert that he consumed a large bottle of brandy and two 1.5 ounce bottles of brandy on the day of the killing, but no witness testified to this. Although Renee testified about Mitchell's overconsumption of alcohol generally, none of her testimony indicated he drank that day. And because the police never ordered a blood draw or urine test for Mitchell, his medical records do not indicate how much alcohol he drank. The only evidence showing Mitchell drank that day was a small, empty bottle of brandy in Renee's kitchen and the smell of alcohol on his breath. Renee also testified that her son sounded "calm" and seemed normal when Apling arrived.[36]

[34] RP (June 4, 2019) at 833.

[35] State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003) (citing State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992)).

[36] RP (June 10, 2019) at 1005.

To the extent other evidence could have been used as proof of voluntary intoxication, the record is also unsupportive. Mitchell was on prescription fentanyl the day of the killing,[37] but the intoxication expert explained fentanyl would not, without more, make him unable to form the intent to kill. Mitchell was the only witness who could establish he drank enough alcohol or took enough drugs to lose the ability to form intent that day. Because having him testify would be incredibly risky, he fails to show defense counsel was deficient by making a strategic decision on that basis.

Mitchell contends defense counsel were ineffective because they did not sufficiently cross-examine Renee. "Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. . . . [W]e need not determine why trial counsel did not cross examine if that approach falls within the range of reasonable representation."[38] Whether to cross-examine a witness is often tactical because it could open the door to damaging evidence or not provide evidence useful to the defense.[39]

Renee testified and was a "key" witness for the defense.[40] Her testimony was critical to establishing Mitchell's accident theory. For example, she testified that Mitchell never pointed the gun at Apling, only pointing it at himself or straight

[37] Mitchell also had a valid prescription for oxycodone to help manage his chronic pain, but no evidence demonstrated he had taken it that day.

[38] Davis, 152 Wn.2d at 720.

[39] In re Brown, 143 Wn.2d 431, 451, 21 P.3d 687 (2001) (citing In re Pers. Restraint of Gentry, 137 Wn.2d 378, 404, 972 P.2d 1250 (1999)).

[40] RP (June 3, 2019) at 530.

up in the air. She also testified about Mitchell and Apling "wrestling" for the gun and how Apling was pulling on the gun.[41]

Mitchell argues he received ineffective assistance because of the following exchange with defense counsel on cross-examination:

> [Defense counsel]: And during this struggle [for the gun] was when they fell over the glass table?
>
> [Renee]: Yes.
>
> [Defense counsel]: And that glass table was adjacent to the closet, correct?
>
> [Renee]: Yes.
>
> [Defense counsel]: And correct me if I'm wrong, they fell over the glass table during the struggle for the gun, and then they get back up again?
>
> [Renee]: Yes.
>
> [Defense counsel]: And they were still struggling for the gun at that point?
>
> [Renee]: Yes.
>
> [Defense counsel]: Was [Mitchell] trying to point the gun at his head still?
>
> [Renee]: Yes.
>
> [Defense counsel]: And then they fell into the closet?
>
> [Renee]: Yes. I don't know if they fell into the closet. I just know that the struggle, you know, led them into the closet.
>
> [Defense counsel]: They struggled into the closet. And was it fairly quickly after that that you heard the gunshot?

[41] RP (June 10, 2019) at 1013.

[Renee]: Yes.

[Defense counsel]: You say a few seconds?

[Renee]: Yes.[42]

Mitchell argues defense counsel should have refreshed Renee's recollection to establish that Mitchell and Apling fell into the closet. But the record does not show it would have been appropriate to refresh Renee's recollection. Before a witness's recollection may be refreshed, it must be demonstrated that their memory needs refreshing.[43] The record does not show Renee could not remember the events leading up to the shooting, so seeking to refresh her recollection would not have been appropriate. Thus, Mitchell's real argument is that defense counsel should have impeached Renee with a prior inconsistent statement. But Renee was a key defense witness. Deciding against undermining the credibility of a key defense witness is reasonable, especially when her testimony is consistent with the defense's theory of the case. The implication is the same for the jury whether Mitchell and Apling fell into the closet or struggled into the closet. Because "we need not determine why trial counsel did not cross examine if that approach falls within the range of reasonable representation,"[44] Mitchell fails to establish the decision not to impeach Renee was deficient.[45]

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[42] Id. at 1049-50 (emphasis added).

[43] State v. McCreven, 170 Wn. App. 444, 475, 284 P.3d 793 (2012) (citing State v. Little, 57 Wn.2d 516, 521, 358 P.2d 120 (1961)).

[44] Davis, 152 Wn.2d at 720.

[45] We also note that Renee's prior statements were consistent with her trial testimony. Mitchell relies upon several documents, including an application for a search warrant written by the lead investigating detective, as proof Renee said

Mitchell's trial counsel conducted a reasonable investigation into defense theories, chose a reasonable case theory based on the evidence, and made reasonable strategic decisions around cross-examination.[46] Mitchell fails to establish his defense counsel's performance was deficient.[47] Because their performance was not deficient, he fails to establish ineffective assistance of counsel.[48]

II. Motion to Substitute Counsel

Mitchell argues the court deprived him of the right to effective defense counsel when it denied his motions for substitute counsel during trial. We review a trial court's decision to deny a motion for substitute counsel for abuse of discretion.[49]

Apling and Mitchell fell into the closet. But Renee told the detective that Mitchell and Apling wrestled or went into the closet. She did not say they fell. During the interview, the detective recast Renee's statement as Mitchell and Apling "tumbling" into the closet, CP at 473, and Renee did not correct him. This detail was then repeated in the detective's application for a search warrant and his certificate for determination of probable cause.

[46] To the extent Mitchell argues limited cross-examination prevented him from establishing his theories of voluntary intoxication or diminished capacity, it is immaterial because the accident theory was valid and reasonable. "Once counsel reasonably selects a defense . . . 'it is not deficient performance to fail to pursue alternate defenses.'" Davis, 152 Wn.2d at 722 (quoting Rios, 299 F.3d at 807).

[47] See Fedoruk, 184 Wn. App. at 880 (reasonable strategic decisions made after investigation of relevant law and facts are not deficient).

[48] Lopez, 190 Wn.2d at 109.

[49] State v. Hampton, 184 Wn.2d 656, 663, 361 P.3d 734 (2015) (citing State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010)).

An indigent defendant has the right to counsel but not to the counsel of their choice.[50] An indigent defendant can move for substitute counsel upon a showing of good cause, such as a total breakdown in communications or an irreconcilable conflict.[51] A defendant's loss of trust or confidence in their attorney does not warrant substituting new counsel.[52]

Mitchell appears to argue irreconcilable conflict pretrial between himself and his attorneys led to a total breakdown in communications by the time of trial. But when Mitchell moved for substitute counsel on the third day of trial, Moore told the court, "I don't have any issues communicating with Mr. Mitchell."[53] Mitchell did not correct or disagree with him. When Mitchell again moved for substitute counsel on the sixth day of trial, he did not mention poor communication. And a post-trial declaration from Mitchell filed in support of his CrR 7.5 motion details multiple meetings both before and during trial in which Isitt, Moore, and Mitchell communicated about his defense.[54] The record does not show a total breakdown in communication before or during trial.

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[50] Id. at 662-63 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 151, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)).

[51] State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012) (citing State v. Schaller, 143 Wn. App. 258, 267-68, 177 P.3d 1139 (2007)).

[52] Id. (citing State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997)).

[53] RP (June 3, 2019) at 547.

[54] See CP at 815 ("Prior to trial, I had many questions for defense counsel Isitt and Moore about my trial defense . . . . They told me that diminished capacity was a very hard defense to prove . . . They also said they were probably not going to introduce anything about my mental health at trial. . . . I was told they were thinking about an intoxication defense. . . . The next day, Mr. Isitt and Mr. Moore

The question is whether Mitchell's disagreements with his attorneys amounted to an irreconcilable conflict. A court weighs three factors to determine whether an irreconcilable conflict existed: "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion."[55]

Regarding the third factor, Mitchell's motions for substitute counsel were made during a trial that had already been delayed by more than one year following the replacement of Mitchell's original defense counsel. Jury voir dire alone lasted two-and-a-half days. As the trial judge explained when denying Mitchell's second motion on the sixth day of trial, "I can't in good conscience discharge counsel at this stage of the game."[56]

"[O]ne of the basic limits on the right to counsel of choice is 'a trial court's wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar.'"[57] "'[W]here the request for change of counsel comes during the trial, or on the eve of trial, the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request.'"[58]

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came to see me. . . . [During trial] Mr. Moore told me that I wouldn't like his opening [statement].").

[55] In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

[56] RP (June 11, 2019) at 1107.

[57] Hampton, 184 Wn.2d at 663 (alteration in original) (quoting Gonzalez-Lopez, 548 U.S. at 152).

[58] Stenson, 142 Wn.2d at 732 (quoting United States v. Williams, 594 F.2d 1258, 1260-61 (9th Cir. 1979)).

Because a jury had been empaneled to hear a long-delayed trial, this factor strongly favors upholding the trial court's decision.

For the second factor, Mitchel contends the court failed to conduct an adequate inquiry into his motion. But the record shows the court heard Mitchell's motions as soon as they were raised and took them seriously. The colloquies were conducted in limine, Mitchell was given time to speak without interference from the court or counsel, and the judge asked defense counsel questions to explore and test Mitchell's allegations. The court also invited Mitchell to make a written motion for reconsideration after denying his first motion, which was made orally.

Mitchell analogizes to United States v. Nguyen,[59] but it is not apt. Unlike that case, the judge tested Mitchell's allegations by asking defense counsel probing questions; Mitchell did not provide extrinsic evidence showing he could not communicate with his attorneys; defense counsel did not agree that all communication had broken down; the trial had been going on for several days; and the judge had been observing Mitchell and his attorneys during trial. Mitchell fails to demonstrate the court's inquiry was inadequate. This factor favors upholding the trial court's decision.

For the first factor, the extent of the conflict, we consider "the extent and nature of the breakdown in communication between attorney and client" and the

[59] 262 F.3d 998 (9th Cir. 2001).

breakdown's effect on representation.[60] The nature of the conflict between Mitchell and defense counsel was, as the trial court noted, "a strategy dispute."[61] In his first motion for substitute counsel, Mitchell pointed out disagreements with defense counsel about which witnesses to call, whether to raise a mental health defense, and whether to defer to his opinions on which jurors to empanel. When Mitchell made his second motion for substitute counsel, he said, "I don't believe that I have been defended the right way"[62] because of defense counsel's decisions about which witnesses to call, questions to ask witnesses on direct and cross-examination, and other evidentiary decisions.

The core concern of denial of a motion to substitute new counsel is denial of the defendant's Sixth Amendment right to effective assistance of counsel.[63] Legitimate trial strategy and tactics "cannot serve as a basis for a claim" for ineffective assistance of counsel.[64] Mitchell and defense counsel communicated about trial strategy and tactics but disagreed. As discussed above, Mitchell has not demonstrated Isitt and Moore provided deficient representation. This factor favors upholding the trial court's decision.

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[60] Stenson, 142 Wn.2d at 724.

[61] RP (June 3, 2019) at 545.

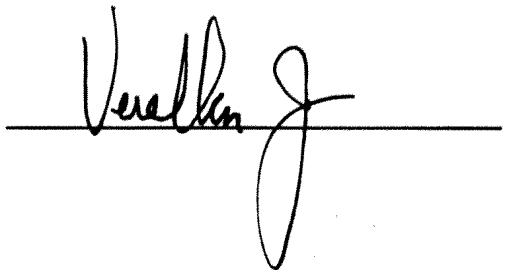
[62] RP (June 11, 2019) at 1101.

[63] See Stenson, 142 Wn.2d at 722 ("If the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel.") (citing Moore, 159 F.3d at 1158).

[64] State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

Because the record does not show a total breakdown in communication or an irreconcilable conflict, Mitchell fails to show the trial court abused its discretion by denying his motions for substitute defense counsel.

Therefore, we affirm.



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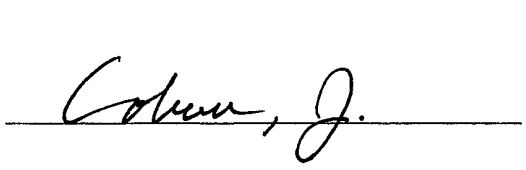

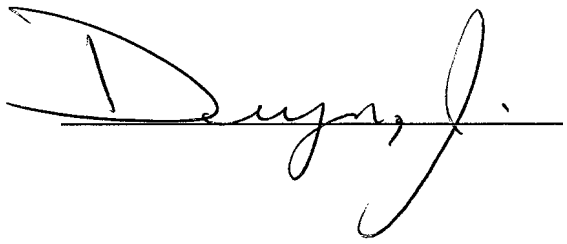

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