NO. 44558-1-II

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

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER EUGENE SETZER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-00433-5

RESPONDENT'S SUPPLEMENTAL RESPONSE BRIEF

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RESPONDENT'S SUPPLEMENTAL RESPONSE BRIEF

The State submits this supplemental response brief in response to Appellant's Amended Opening Brief. The State continues to rely upon all arguments previously made in its Response Brief to Appellant's Opening Brief.

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. Setzer received effective assistance of counsel

II. The trial court properly entered its findings of facts, supported by substantial evidence

III. The trial court properly entered its conclusions of law based on proper application of the law to the facts

B. STATEMENT OF THE CASE

The State relies upon its statement of the case in its original Response Brief, with the addition of the following:

During the hearing on his personal restraint petition, Setzer testified regarding potential juror Ms. Miles' statements regarding defense witness, stating:

> Well, she stood up and said that she knew Marvin Dean Gregory, one of my witnesses. She said that she knew Marvin had grown up in Lyle, Washington and that she knew him very well and that he was a no-good person

> and—negative, very unbelievable, that she didn't—if she was to hear it, she wouldn't believe anything he had to say.

RP 20-21. The transcript from the voir dire shows Ms. Miles and the court had the following exchange:

> Court: "So if you know him, how would that affect you if he testifies as a witness?"
>
> Ms. Miles: "Negative. It would be negative."
>
> Court: "So you've already formed an opinion then?"
>
> Ms. Miles: "Based on my prior knowledge, correct."

CP 366; CP 243.

Regarding witness Dorene Shinabarger, her employment with Clark County was not terminated due to dishonesty on her part, any allegations regarding improper conduct regarding jury selection, or the initial selection of juror names. RP 58. She explained that her termination had to do with the confidentiality procedures in the clerk's office. RP 59.

C. ARGUMENT

I. Setzer Had Effective Assistance of Counsel and the Trial Court did not err in so finding.

Setzer challenges the dismissal of his personal restraint petition in this direct appeal of the Superior Court's decision on the merits of his petition. Setzer claims the trial court erred in finding certain witnesses credible, erred in entering findings of fact based on those witnesses'

testimony and erred in finding his trial counsel was effective. The trial court did not err in any of its findings; Setzer was provided with effective assistance of counsel at trial, no decisions made by his attorney were improper, and even if they were, Setzer suffered no prejudice. Setzer's claim the trial court erred in denying his petition fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "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) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

a. It was not ineffective for defense counsel to fail to request a continuance

Setzer claims his attorney's failure to request a continuance due to Setzer's use of medications denied him his due process right to present a complete defense. Setzer's claim is without merit. The trial court properly concluded that Setzer received effective assistance of counsel.

First, Setzer's claim he could not testify at trial due to medication is not credible. Second, Setzer could have chosen to discontinue his medication in order to feel he was able to testify. The trial lasted more than one day. *See* Trial VRP. Setzer could have stopped using his medication and testified on the second day of trial had he wanted to. Setzer still had a prescription for the same medications he claimed use of

during the trial at the hearing on his personal restraint petition 5 years later. RP 8. However, Setzer was not using those medications and used ibuprofen and Tylenol instead. RP 8. This clearly would have been an option for him at the time of his trial as well, and this is not something he could not have done absent a continuance. Setzer had plenty of time to make the decision to discontinue use of his medications prior to trial and he chose not to. This is not the type of situation in which CrR 3.3 allows for emergency continuances day of trial.

Further, defense counsel testified that he believed Setzer to be intelligent, oriented and coherent at the trial. RP 83. At no point did defense counsel feel Setzer could not aid and assist in his defense. RP 93. Though there are ways for defense to request a continuance under CrR 3.3, to do so morning of trial, defense would need to have presented compelling reasons to the court to obtain such a continuance. Setzer knew about the trial for some time, and surely over the weekend he could have discontinued his pain medication, or substituted it with Tylenol and ibuprofen as he did at the personal restraint petition hearing so that he could have testified, if he had chosen. However, the more credible scenario is that defense counsel, for strategic reasons, recommended that Setzer not testify at trial. RP 66-67. Per defense counsel testimony, Setzer agreed to this course of action. RP 66-67. It is clear that Setzer's pain issue

was not going to change in the time a continuance would have given him. Setzer's pain is chronic, and existed during the hearing on the personal restraint petition 5 years later. RP 6-8. A continuance would have done nothing for Setzer's condition, and any changes in medication he had time to make before he testified anyhow. Setzer's claim that a continuance was the only way he could present a proper defense is without any merit. Further, Setzer cannot show any prejudice as it is unlikely the trial court would have granted a continuance when a resolution was so simple (Setzer's easy ability to discontinue use of his medication), and it's not credible that he would have suffered any prejudice as defense counsel testified that he strongly recommended Setzer not testify due to strategic reasons and that Setzer agreed with this. RP 66-67, 81-82.

Setzer was not able to show, and still cannot show, that his counsel was ineffective for failing to request a continuance on the morning of trial for this purpose. The court below did not err in finding defense counsel credible and in finding that counsel was not ineffective for failing to request a continuance.

b. Defense Counsel was not ineffective for failing to move to disqualify the entire venire based on supposed misconduct by the clerk

Setzer alleges his trial counsel was ineffective for failing to investigate and move to disqualify the jury venire because Setzer claimed

misconduct by the court clerk in selecting the jurors' names. Setzer's attorney was not ineffective for failing to investigate or move to disqualify the entire venire because Setzer's claim was not credible, the attorney did not see anything happen, and the entire venire had already been selected at random so it mattered little in which order the jurors were seated. The court below did not err in finding trial counsel was not ineffective.

The trial court is in the best position to determine the credibility of witnesses and to determine the facts. In reviewing challenged findings of facts on appeal, the standard of review is whether the challenged findings of fact are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993)). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding). *Hill*, 123 Wn.2d at 644 (citing *Halstien*, 122 Wn.2d at 129). Further, the trial court is afforded the best opportunity to evaluate contradictory testimony. *Hill*, 123 Wn.2d at 646 (citing *Haynes v. Washington*, 373 U.S. 503, 516, 83 S. Ct. 1336, 10 L.Ed.2d 513 (1963)). Where there is substantial evidence supporting a finding of fact, that finding of fact is binding on appeal. *Hill*, 123 Wn.2d at 647.

Below, the trial court's findings that the court clerk followed the proper procedure is supported by the clerk's testimony in the record. RP 48-52. Further, it is clear, and Setzer does not allege otherwise, that this clerk had no bias against Setzer, no personal knowledge of the case, and no reason to "stack the jury" against Setzer. RP 52-53. In fact, this clerk would have jeopardized her job had she chosen names nonrandomly, and that fact, combined with the lack of evidence that this clerk had no knowledge of this case, no bias against Setzer and no personal interest in the case, shows that it was not a credible claim that Setzer made. The trial court was in the perfect place to determine credibility of the witnesses, and she determined the court clerk was more credible than Setzer, evidenced by the court's findings.

The trial court was well aware of Setzer's likelihood to embellish, exaggerate or lie based on his testimony during this hearing and its comparison to the verbatim transcript of the record from trial. For example, Setzer claimed potential juror Ms. Miles said she knew defense's witness "very well and that he was a no-good person and—negative, very unbelievable, that she didn't—if she was to hear it, she wouldn't believe anything he had to say." RP 21. The actual transcript shows this juror was asked the following question: "So if you know him, how would that affect you if he testifies as a witness?" CP 366; CP 243. Her response was:

"Negative. It would be negative." CP 366; CP 243. And the court followed up with: "So you've already formed an opinion then?" And the juror responded, "Based on my prior knowledge, correct." CP 366; CP 243. These responses are a far cry from calling a witness a "no-good person" and "unbelievable" and that she wouldn't believe anything this witness had to say. Setzer denied Ms. Miles responded as the verbatim report of proceedings indicates she did. RP 40. This was an example to the trial court of the defendant's credibility while he testified. It is completely within the trial court's discretion to determine which witnesses it finds more credible than others. From the trial court's findings on this matter it is evident the judge found the court clerk to be more credible than Setzer regarding the method in which the jurors were selected. This was not error on the trial court's part, but rather an exercise of her fact-finding duties.

Further evidence that Setzer was not a credible witness occurred during his testimony regarding two other potential jurors and their statements during voir dire. Setzer was also insistent that two potential jurors claimed they had appointments at the tire shop that same day and that they were personal friends and knew the witnesses and their wives. RP 35-36. This was not supported by the verbatim report of proceedings for the voir dire. One unidentified potential juror claimed she knew of Dave Monte (witness) through her husband and that she had an

appointment to have her tires done that day. CP 240. However, no other potential jurors indicated they had appointments at the tire shop on that date. CP 238-40. Setzer also appeared to have forgotten the jurors said that their business relationship with the tire shop would not affect the way they felt about the case. RP 36-38. Setzer's claim that it was obvious the clerk cherry picked jurors' names because several jurors were friends with witnesses was not supported by the record. RP 18. Again, the trial court was perfectly within its bounds to use this information and evidence in making its credibility determinations.

The trial court's findings that the clerk did comport with proper procedure is supported by substantial evidence and should be treated as a verity on appeal. As the clerk followed the proper procedure, there was no reason for defense counsel to object and move to strike the entire jury venire. Further, no prejudice ensued to Setzer from his counsel's failure to investigate or request to strike the venire as the entire panel was randomly selected already, and there is no likelihood any trial court would have stricken the venire panel from Setzer's unsubstantiated claim of tampering. Trial counsel was not ineffective and the court below did not err in finding the clerk's testimony to be credible and in making its finding that the clerk followed the proper procedure. Setzer has not shown any deficient performance nor has he shown prejudice. His claim fails.

c. Defense counsel was not ineffective for failing to seek disqualification of the jury panel based on one potential juror's comments

Setzer claims his defense attorney was ineffective for failing to move to remove the entire venire panel after potential juror Ms. Miles indicated she had a negative opinion of a potential witness in the trial. Setzer's attorney's decision not to challenge the entire jury panel was tactical and Setzer cannot show he was prejudiced by his attorney's failure to move to disqualify the panel as no trial court would likely have granted such a motion. The court below properly considered the evidence and the law and found defense counsel was not ineffective. This finding was appropriate and should be affirmed.

If Setzer's reasoning is taken to its likely conclusion, anytime an attorney or the trial court asked if a potential juror knew a witness and that potential juror expressed a negative opinion of the witness, then the entire jury venire would have to be thrown out. This could lead to absurd results. The court and counsel did as they needed to ensure Setzer received a fair trial- make sure no jurors on the panel had any preconceived opinions of the witnesses that would affect how they received the testimony.

Setzer relies upon *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997) to support his argument that the juror's comments during voir dire tainted the entire panel and therefore his attorney should have moved to have the

entire panel disqualified. However, *Mach* is distinguishable from the facts of Setzer's case. *Mach* involved repeated, expert-like statements directly concerning guilt. This case involved an isolated person, not as Setzer claims giving her opinion on a witness's veracity, but instead indicating she was biased about a potential witness in a negative way. The trial court found the "statements of the juror in the presence of other jurors were very limited." CP 366. This finding is supported by substantial evidence.

Setzer's case is more factually similar to *State v. Alires,* 92 Wn. App. 931, 966 P.2d 935 (1998). In *Alires,* Division 3 of this Court recognized it was a legitimate trial strategy for a trial attorney to not pursue disqualification of jurors that he felt the trial court would not disqualify. *Alires*, 92 Wn. App. at 939. In *Alires*, some jurors made statements which could have been interpreted as evidence of bias and the trial attorney chose not to challenge these jurors because he did not want to antagonize any jurors by unsuccessfully challenging them. *Id.* The Court found that as the defendant's trial counsel's choice was a legitimate trial strategy it could not serve as a basis for a claim of ineffective assistance of counsel. *Id.*

Setzer's case is strikingly similar to the situation in *Alires*. Though Setzer's attorney did move to strike a juror he felt was biased, he made a tactical decision not to risk antagonizing the remaining jurors and did not

pursue a motion to strike the entire panel for that reason, and because he felt it would not have been a successful motion. RP 77 This was a legitimate trial strategy and therefore cannot serve as a basis for Setzer's claim of ineffective assistance of counsel. A strategic or tactical decision is not a basis for finding error in trial counsel's performance. *Strickland*, 466 U.S. at 689-91.

Even if this Court finds trial counsel's choice was not a legitimate trial strategy, Setzer cannot show prejudice. As the trial court found in deciding his personal restraint petition, it is unlikely the trial court would have granted this motion. CP 366. Setzer's extremely experienced trial counsel also believed the trial court would not have granted the motion. CP 366; RP 77. Setzer has not shown, and cannot show that this juror's statement caused jury bias or prejudice, or that his attorney would have been successful in moving to disqualify the entire panel. Setzer cannot meet the requirements of a claim for ineffective assistance of counsel.

D. CONCLUSION

Setzer's trial counsel was effective in all respects. The court below, during its hearing on Setzer's personal restraint petition, properly considered the evidence and the law and entered sound findings of fact and conclusions of law, appropriately finding Setzer was not denied

effective assistance of counsel. Setzer's claims have no merit and the court's decision below should be affirmed.

DATED this 30th day of April, 2014.

Respectfully submitted:

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