NO. 47892-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARLON HOUSE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

Nos. 14-1-00938-2 and 14-1-00937-4

BRIEF OF APPELLANT

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B. STATEMENT OF THE CASE.

1. Procedure and Facts

In March of 2014, the Pierce County Prosecutor's Office charged MARLON HOUSE, hereinafter "defendant", with one count of rape of a child in the first degree and two counts of child molestation in the first

degree under cause number 14-1-00938-2, and three counts of rape of a child in the first degree under cause number 14-1-00937-4. CP 97-101[1]. At a status conference on August 14, 2014, defendant made a motion for a new attorney which the court denied. 1RP[2] 3-7.

On May 15, 2015, pursuant to a plea agreement, the State filed amended informations in both cause numbers and defendant pleaded guilty to one count of rape of a child in the first degree under cause number 14-1-00938-2, and one count of rape of a child in the first degree under cause number 14-1-00937-4. CP 1-14, 102-114; 1RP 8-15. He admitted to sexually assaulting two female child victims ages eight and nine. CP 1-14; 102-114.

As part of the plea agreement, the State recommended 160 months to life in each case to run concurrent to one another, and defendant requested a Special Sex Offender Sentencing Alternative (SSOSA) pursuant to RCW 9.94A.670. CP 7, 107; 2RP 53-73. The State filed a sentencing memorandum outlining the reasons for its recommendation and argued against the SSOSA citing the defendant's lack of candor and honesty and questioning the evaluator's conclusion that defendant was amenable to treatment. CP 54-88. The State also provided the court with

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[1] The State is filing a supplemental designation of clerk's papers to include several documents.

[2] The verbatim report of proceedings is contained in two volumes. The volume involving dates 8/22/14 and 5/15/15 will be referred to as "1RP" and the volume containing dates 6/25/15 and 7/14/15 will be referred to as "2RP".

and relied on two victim impact statements from the victims' mothers. CP 115-118. Although they do not explicitly state they are not in favor of the court granting defendant a SSOSA, the tone of the statements[3] suggest they are not. CP 115-118. The State also provided the court with the pre-sentence investigation reports from both cases which also recommended against giving defendant a SSOSA. CP 38-53; 119-136.

In support of his request for a SSOSA, defendant provided the court with a psychosexual evaluation and treatment plan and the results of a sexual history interview polygraph examination. CP 64-88. Michael Comte, a psychotherapist who evaluated defendant and wrote the psycho sexual evaluation and treatment plan, also testified during the hearing. 2RP 16-52. He believed that defendant was at low risk for future sexual offending and amenable to treatment, and therefore recommended defendant be given a SSOSA. CP 73. Defendant also spoke to the court and requested he be given a SSOSA. 2RP 75-79.

After reviewing all of the documents and considering the factors outlined by the SSOSA statute, the trial court denied defendant's request for a SSOSA and sentenced him to 160 months to life on each count to run concurrent to one another. 2RP 79-88; CP 19-35. Defendant filed timely

[3] The victim impact statements contain sentences such as "You deserve terrible, unspeakable things to happen to you", "I hope you rot for what you've done" and "I feel that he should get the maximum sentence that carries for this heinous crime that he has committed against my child". CP 115-118.

notices of appeal on both cause numbers. CP 92, 137. This Court consolidated both appeals under cause number 47892-7.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A NEW ATTORNEY AS THE RECORD REFLECTS IT CONDUCTED AN ADEQUATE INQUIRY AND FELT THAT IT UNDERSTOOD THE ISSUES SUCH THAT A FORMAL HEARING WAS UNNECESSARY.

A defendant in a criminal prosecution has a right to the assistance of counsel. U.S. Const. amend VI; WASH. CONST. art. 1, § 22 (amend. 10). Indigent defendants charged with felonies, or misdemeanors involving potential incarceration, are entitled to appointed counsel. ***McInturf v. Horton***, 85 Wn.2d 704, 705-07, 538 P.2d 499 (1975); CrR 3.1(d)(1). However, "[a] defendant does not have an absolute, Sixth Amendment right to choose any particular advocate." ***State v. Stenson***, 132 Wn.2d 733, 940 P.2d 1239 (1997)(*citing* ***State v. DeWeese***, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991)). Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of a new attorney is a matter within the discretion of the trial court. *Id.*

To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of

interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id.* at 734. Factors to be considered in a decision to grant or deny a motion for new counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. *Id.* (*citing* ***State v. Stark***, 48 Wn. App. 245, 253, 738 P.2d 684 (1987)).

A defendant's conclusory, unsubstantiated statement that his current counsel is unqualified does not entitle defendant to a new counsel. ***State v. Staten***, 60 Wn. App. 163, 169, 802, P.2d 1384 (1991), *review denied*, 117 Wn.2d 1101, 816 P.2d 1224 (1991) (*citing* ***Wilks v. Israel***, 627 F.2d 32, 36 n. 4 (7th Cir.1980), *cert. denied*, 449 U.S. 1086, 101 S.Ct. 874, 66 L.Ed.2d 811 (1981)). Unsupported general allegations of deficient representation are inadequate to support a motion for new counsel, particularly when the motion is brought shortly before or during trial. *Id.* at 170 (*citing* ***Wilks***, 627 F.2d at 36). A defendant's loss of confidence or trust in his attorney is generally an insufficient basis for substitution of counsel. ***State v. Varga***, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

In August of 2014 in the present case, a status conference was held where the defendant made a motion for a new attorney. 1RP 4. Defendant told the court his counsel had done nothing on his case, had talked to him only four times and had failed to give his court papers to his mother as he

had asked. 1RP 5-6. Defense counsel outlined his progress on the case before the court denied defendant's request stating:

> I'm denying your request to have a new public defender. When you have the privilege of hiring your own counsel, then you can hire and fire. When the county pays for it, on the record before me [the defense attorney] is moving forward on your case. There is (sic) no set times that he is required to visit you in preparation for your case.
>
> He has interviewed all of the witnesses that you have asked him, except for the alleged victim, and you need to understand that there is a significant import when the alleged victims are interviewed by the defense, any resolution short of trial is impossible after that time.

1RP 6-7. On appeal, defendant contends that the trial court abused its discretion by failing to conduct an adequate inquiry into defendant's concerns with his attorney before denying his motion for a new attorney. Brief of Appellant 18-21.

In determining whether to substitute counsel, a trial court conducts an adequate inquiry by allowing the defendant and counsel to express their concerns fully. ***State v. Schaller***, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). Formal inquiry is not essential where the defendant otherwise states his reasons for his dissatisfaction with his counsel on the record. ***Schaller***, 143 Wn. App. at 271 (***United States v. Willie***, 941 F.2d 1384, 1391 (10th Cir. 1991); ***United States v. Padilla***, 819 F.2d 952, 956 n.1 (10th Cir. 1987)). The record in the present case makes clear that the trial court did not abuse its discretion in denying defendant's motion and did in fact make an adequate inquiry into the issues.

Defendant was allowed to express his concerns about his counsel on the record and even thanked the court for allowing him to speak. 1RP 5-6. He described how he felt his attorney was merely saying he had done things on defendant's case, but had only spoken to him four times. 1RP 5-6. He also said the attorney had failed to give defendant's court papers to his mother and he had filed a grievance with the Bar Association[4]. 1RP 5-6. After defendant spoke, the court told defendant "I got the tenor of what your issue is" and clarified that defendant was asking for a new attorney. 1RP 6.

The court also heard from defense counsel about his progress on the case and his responses to the defendant's concerns. 1RP 3-6. He said he had spoken to the defendant several times and retained an investigator who had made contact with every witness defendant had asked to be subpoenad for trial. 1RP 4. The defense attorney indicated that he had not interviewed the two alleged victims yet and explained to the defendant that he wanted to explore a possible resolution and the prosecutor's office has a policy where once the victims are interviewed, it makes resolution of the case difficult, if not impossible. 1RP 4. He also stated that he had had several conversations with defendant's mother who had provided him documents that day and he had apologized for missing her when she

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[4] Defendant argues that the bar grievance "created an inherent conflict" between defendant and his attorney. Brief of Appellant at 19. But the filing of a bar grievance does not necessitate the appointment of substitute counsel. ***State v. Sinclair***, 46 Wn. App. 433, 437, 730 P.2d 742 (1986).

initially tried to speak with him. 1RP 3-6. At the end, he stated "I'm doing what I can for Mr. House, given the resources I have, and given the state of the evidence and I am certainly willing to represent him in these charges." 1RP 6.

Not only did the trial court allow defendant and his attorney an opportunity to express their concerns and positions, before hearing from them the court made clear it would order a full hearing at a later date if it was necessary. 1RP 5. Before defendant spoke, the court said "I will let you speak briefly, Mr. House, only to get a general feeling for what the issue might be. If I need to have a full hearing, then I will have to reset it, but tell me what it is that you wanted the Court to know." 1RP 5. The trial court did not abuse its discretion in denying defendant's motion for a new attorney as the record reveals it conducted an adequate inquiry and felt a formal hearing was unnecessary.

In his argument, defendant likens this case to ***United States v. Nguyen***, 262 F.3d 998 (9th Cir. 2002), where the failure to conduct a full hearing constituted reversible error. Specifically, he argues the trial court should question the attorney or defendant "privately and in depth", but the record in the present case differs substantially from the ***Nguyen*** case. Brief of Appellant at 18-19. As summarized by Division One of the Court of Appeals:

> In ***Nguyen***, a non-English speaking defendant repeatedly asked to substitute privately retained counsel for his public defender with whom he ceased communicating. Nguyen

> offered witnesses to support his claim about his public defender's conduct but the court did not pursue any of the allegations. Rather, the court decided the matter at a pretrial meeting for which the defendant was neither present nor aware of and then refused to give Nguyen a full hearing on the issue. On appeal, the Ninth Circuit Court of Appeals found the trial court's decision was based more on keeping its schedule than on any inquiry into Nguyen's contentions.

State v. Schaller, 143 Wn. App. 258, 269, 177 P.3d 1139 (2007), *review denied*, 164 Wn.2d 1015, 195 P.3d 88 (2008).

In contrast, all parties in the present case were present in court and allowed to express their concerns on the record before the court. 1RP 3-6. Defendant did not present any witnesses or evidence to support his claims, and defense counsel described his progress and efforts on behalf of the defendant. 1RP 3-6. The trial court knew it could hold a full hearing, but felt it adequately understood defendant's concerns and the defense attorney's position such that one was not needed. 1RP 3-6. Given the vast differences between the two cases, defendant's comparison and reliance on ***Nguyen*** is misplaced.

Defendant also makes arguments in his brief that the trial court misstated the law and made comments that appeared to be biased and unfair to the defendant. Brief of Appellant at 19-21. He contends the trial court's comment that any resolution short of trial was impossible if defendant chose to interview the victims was a misstatement of the law. But the trial court's comment was not based in law and was therefore not a

misstatement of the law. Rather, the court's comment was based upon its experience in handling sexual assault cases involving children and its knowledge of the prosecutor's office's policy that negotiation after such interviews occur is extremely limited. The court was explaining to the defendant that his attorney was taking the appropriate and normal course of action typically taken with cases involving defendant's charges. There was nothing improper about the comment.

Similarly, defendant's allegation that the judge was unfair and biased in the proceeding is without support or merit. An appearance of fairness violation claim requires proof of actual or potential bias. ***State. v. Afeworki***, 189 Wn. App. 327, 356, 358, P.3d 1186 (2015). Mere speculation is not enough. *Id.* A judge is presumed to perform his or her duties without prejudice. *Id.* Defendant's only support for his claim in the present case is that the court made the statement "[w]hen you have the privilege of hiring your own counsel, then you can hire and fire. When the county pays for it, on the record before me, [the defense attorney] is moving forward on your case." 1RP 7. This is not proof of potential bias, let alone actual bias. It is the court telling the defendant that the right to counsel does not necessarily include the right to counsel of his choice and based upon the information that the court had heard, the defendant had failed to meet his burden to justify the appointment of new counsel. Defendant's claim that the trial court was unfair or biased is without

support and lacks merit. The trial court did not abuse its discretion in denying defendant's motion for a new attorney.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT A SSOSA AS DEFENDANT FAILS TO SHOW MR. COMTE'S REPORT WAS DEFICIENT OR THAT THE FINDINGS ABOUT ADDITIONAL VICTIMS BEING UNKNOWN WAS ERRONEOUS.

Under the Sentencing Reform Act of 1981 (SRA), certain sex offenders are eligible to receive a Special Sexual Offender Sentencing Alternative (SSOSA) provided they meet the qualifications in RCW 9.94A.670. Once they are determined to be eligible for a SSOSA, the court on its own or on motion by the State or the offender may order the defendant to undergo an examination to determine whether they are amenable to treatment. RCW 9.94A.670(3). The report of the examination must include at minimum:

> (i) The offender's version of the facts and the official version of the facts;
>
> (ii) The offender's offense history;
>
> (iii) An assessment of problems in addition to alleged deviant behaviors;
>
> (iv) The offender's social and employment situation; and
>
> (v) Other evaluation measures used.

RCW 9.94A.670(3)(a). It should detail the examiner's opinion regarding the defendant's amenability to treatment and relative risk to the community and set forth a proposed treatment plan. RCW 9.94A.670(3)(b). The statute also details that "[t]he court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment." RCW 9.94A.670(3)(c). After receiving the reports, the court must consider numerous other factors and determine whether a SSOSA is appropriate. RCW 9.94A.670(4).

The decision whether to sentence a defendant to a SSOSA is entirely within the trial court's discretion and not reviewable on appeal. ***State v. Onefrey***, 119 Wn.2d 572, 574-575 n. 1, 835 P.2d 213 (1992); ***State v. Mail***, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). However, a defendant may challenge the trial court's failure to follow the specific procedure required by the SRA on appeal. ***Mail***, 121 Wn.2d at 711-12; ***State v. Conners***, 90 Wn. App. 48, 51-52, 950 P.2d 519, *review denied*, 136 Wn.2d 1004, 966 P.2d 901 (1998).

i. The trial court did not err in not ordering a supplemental report when Mr. Comte's report complied with the statutory requirements.

In an effort to obtain a SSOSA, defendant in the present case underwent a psycho sexual evaluation by Michael Comte who then submitted his report to the court. CP 64-75; 2RP 11-12. The trial court

denied defendant's request for a SSOSA after discussing in great length the factors it is required to consider under RCW 9.94A.670(4)[5]. 2RP 79-88.

On appeal, defendant alleges that the trial court denied his SSOSA request because there were gaps in Mr. Comte's report and the trial court should have ordered a "supplemental report" from Mr. Comte. Brief of Appellant at 11-12. Specifically, defendant argues that the report failed to detail the defendant's version of the events. Brief of Appellant at 12. But any deficiency in the details regarding defendant's version of the events was a result of the defendants own refusal to discuss that with Mr. Comte.

In his first meeting with Mr. Comte, the defendant denied the allegations against him and thus, his version of the events was that they did not occur. CP 65. At next meeting, he again denied the allegations, but said he was going to admit to them in order to take advantage of a plea offer. CP 65. Defendant admitted having difficulty acknowledging what

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[5] RCW 9.94A.670(4) reads in relevant part: "After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment...."

he had done and only began to admit something had occurred after he was told acknowledgment of his behavior was necessary to obtain a SSOSA. CP 65-66. The report reflects how defendant's version of the events changed as Mr. Comte's interviews with the defendant continued. Any deficiency in discussing the defendant's version of events was the result of the defendant refusing to discuss or even acknowledge what occurred and not something Mr. Comte could force him to discuss.

The trial court had no obligation to order a supplemental report when the original report complied with RCW 9.94A.670(3)(a-b). The report was ten and a half pages long, single spaced. It detailed both parties' versions of events, defendant's background, medical, academic, employment, sexual, psychological and substance abuse history. CP 64-75. It included Mr. Comte's opinion that defendant was amenable to treatment, a low risk to the community and set forth a proposed treatment plan should the SSOSA be granted. CP 73-75. The fact that defendant's version of events was that nothing happened, and then changed after time to making some admissions does not make the report deficient. Mr. Comte's report properly described defendant's "version of events" as were told to him and required in RCW 9.94A.670(3)(a). The trial court did not err in not ordering a supplemental report as it had no obligation to do so.

ii. The trial court's finding that whether additional victims was unknown was not erroneous as it was supported by evidence in the record.

A trial court's findings of fact are reviewed for substantial evidence and whether the findings support the conclusions of law. ***State v. Brockob***, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). Conclusions of law are reviewed de novo. ***State v. Carter***, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

During sentencing in the present case, the trial court made the following finding:

> Whether there are additional victims is unknown. The questions that were asked in the polygraph suggest no. The questions were also phrased to take victims out of the age group for which these two victims find themselves, ages eight and nine. The question in the polygraph focused on a different age group.

2RP 82. On appeal, defendant alleges the trial court erred in making this finding as it was not supported by substantial evidence because the questions did include the age group of the victims, eight and nine years old. The relevant questions during the polygraph were:

Q: After the age of 18, approximately how many sexual partners have you had?

A: Doesn't know for sure, at least over a hundred.

Q: Were any of these females under 18 YOA while you were an adult?

A: Yes. Maybe 7 at the most. These girls were in the 16-17 years of age range and he was in the 18-20 years of age range at the time.

Q: Were any of these females under 16 yoa?

A: No.

CP 79. The way the questions are asked, it appears the question asking "were any of these females under 16 yoa" is referring only to the previous questions where the defendant discusses being 18-20 years of age at the time. This belief is supported by the fact that if the question "were any of these females under 16 yoa" was referring to the defendant's entire adult life, the answer would have to be "yes" given the admission to sexual contact with the two victims in this case. Because the answer is no, the question has to be referring to the time period when defendant was 18-20 years old, thus limiting the scope of the question as the trial court correctly found. As a result, defendant's claim that the trial court's finding about whether additional victims exist is unknown was not erroneous as it was supported by the evidence in the record.

Regardless, even if the finding were to be considered erroneous, the trial court's decision not to give the defendant a SSOSA is a discretionary one. Sentencing is reviewed under the abuse of discretion standard, and not as defendant suggests, the substantial evidence or clearly erroneous tests. ***State v. Hays***, 55 Wn. App. 13, 16, 776 P.2d 718 (1989) *See also* ***State v. Cunningham***, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

The trial court does not even have an obligation to give reasons for its determination or to enter any findings. ***Hays***, 55 Wn. App. at 15-16. In this case, the trial court went beyond what was required and discussed in great length on the record its consideration of the factors in determining whether to grant defendant's SSOSA request. 2RP 79-88. As such, even if its finding that the number of victims was unknown was incorrect, defendant is unable to show that the trial court's decision to deny his SSOSA request was an abuse of discretion.

3. DEFENDANT IS UNABLE TO SATISFY EITHER PRONG OF THE ***STRICKLAND*** TEST TO SHOW HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

i. Defendant is unable to show his counsel was ineffective as the decision to delay interviewing the victims was a legitimate strategic decision.

Defendant initially alleges his counsel was ineffective during the plea bargaining phase by failing to adequately investigate. The ***Strickland*** test for ineffective assistance of counsel applies to claims in the plea bargaining process. ***State v. McCollum***, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035 (1999). In order to satisfy the first prong of the test in a plea bargaining context, the defendant must demonstrate that his counsel failed to "actually and substantially" assist him in determining whether to plead guilty. ***State v. Osborne***, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (*quoting* ***State v. Cameron***, 30 Wn. App. 229, 232, 633 P.2d 901, *review denied*, 96 Wn.2d 1023 (1981)). To satisfy the second prong, the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***In re Personal Restraint of Riley***, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (*citing* ***Hill v. Lockhart***, 474 U.S. 52, 59, 88 L.Ed.2d 203, 106 S.Ct. 366 (1985)). Appellate review of counsel's performance starts with a strong presumption of reasonableness. ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Defendant claims that his trial counsel's failure to interview the victims constituted ineffective assistance of counsel because his counsel

failed to conduct an adequate investigation prior to defendant pleading guilty by not interviewing the victims. However, the normal policy of the Pierce County Prosecutor's office is to terminate all plea negotiations and proceed to trial after the defense interviews the victims of child sexual abuse cases. 1RP 4, 7. Defense counsel chose to delay interviewing the victims in the defendant's case in an effort to explore a potential plea bargain. 1RP 4. Once he interviewed the victims, such an offer would no longer be available. Because defense counsel's decision to delay interviewing the victims was a strategic decision, it cannot serve as a basis for a claim of ineffective assistance of counsel. ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). In addition, the record reflects defense counsel had done all the other investigation defendant had asked of him. 1RP 4-5. Defendant is unable to show his attorney's performance was deficient or that it prejudiced him as his attorney's decision to delay interviewing the victims was a legitimate strategic decision.

ii. Defendant is unable to show his counsel was ineffective for not requesting a supplemental report when one was not necessary and he is unable to show such a report would have altered the trial court's decision to deny his request for a SSOSA.

Defendant also alleges his counsel was deficient by failing to recognize Mr. Comte's psychosexual evaluation and treatment report did not include defendant's own version of events and therefore, he should

have requested a supplemental report to provide to the court. Brief of Appellant 14-16. Defendant is unable to show counsel was deficient however, because as described earlier in this brief, Mr. Comte's report did contain defendant's version of events. *See* Section (2)(i). It described his meetings with the defendant and the defendant's progression from initially claiming that nothing had occurred to finally making some admissions to the acts the victims were describing. Defendant's unwillingness to admit or discuss the events was the defendant's version of the events. It was not defense counsel's job to tell Mr. Comte to force defendant into discussing what had occurred, especially when defendant denied anything took place in the first place. Given that, defendant is unable to show defense counsel was deficient for not requesting a supplemental report.

In addition, even if counsel should have requested a supplemental report, it is unknown and unlikely that any supplemental report would have changed the trial court's decision to deny defendant's request for a SSOSA. In other words, defendant is unable to satisfy the second prong of ***Strickland*** and show that but for counsel's actions or lack thereof, the trial court's decision would have been different. The trial court declined to give defendant a SSOSA in spite of Mr. Comte's recommendation for it, and his conclusions that defendant would be amenable to treatment and at low risk for future sexual offending. The court believed the risk to the community would be "huge" and gave great weight to the victims' desires that did not support the SSOSA. 2RP 83. It also expressed concern with

defendant's lack of candor and acknowledgement of his behavior and the belief both by Mr. Comte and the CCO that the defendant is a manipulator. 2RP 83-84. Defendant is unable to show that had defense counsel requested a supplemental report, it would have altered the trial court's decision to deny defendant the SSOSA. Defendant has failed to satisfy either prong of ***Strickland*** and show his counsel was ineffective.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions and sentence.

DATED: May 18, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.18.16 Theresa Kar
Date Signature

PIERCE COUNTY PROSECUTOR

May 18, 2016 - 3:46 PM

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