SUPREME COURT NO. 98486-7
COA NO. 36015-6-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AMEL DALLUGE,

Petitioner.

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

The Honorable David Estudillo, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

A. IDENTITY OF PETITIONER

Amel Dalluge asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Dalluge requests review of the decision in State v. Amel William Dalluge, Court of Appeals No. 36015-6-III (slip op. filed February 25, 2020), attached as appendix A. The order denying the motion to reconsider, entered April 7, 2020, is attached as appendix B

C. ISSUE PRESENTED FOR REVIEW

In a prosecution for failing to comply with sex offender registration requirements, was defense counsel ineffective in proposing an affirmative defense instruction that shifted the burden of proof away from the State and onto the defendant by requiring the defendant to prove that he complied with the registration requirements?

D. STATEMENT OF THE CASE

1. Trial Evidence

Dalluge was convicted of a sex offense in 1998. Ex. 24. In 2014, Officer Edie handled Dalluge's initial registration as a sex offender. 1RP[1]

[1] Citation as follows: 1RP - three consecutively paginated volumes consisting of 11/1/17, 4/18/18, 4/19/18, 4/20/18, 4/23/18; 2RP - one volume consisting of 10/16/17, 10/23/17, 10/30/17, 12/4/17, 3/26/18, 4/16/18, 4/30/18, 5/1/18; 3RP - one volume consisting of 4/20/18, 4/23/18.

233, 238, 244. Upon learning that a sex offender has moved into the county, the sheriff's office goes over the registration rules. 1RP 235-37. One of the rules was to notify the sheriff's office within three days of changing address. 1RP 245. Edie explained the rules to Dalluge. 1RP 245-46, 304. Dalluge complied with requirements while he had a fixed residence, filling out verification requests and notifying the sheriff's office of a change of address. 1RP 246-51; Ex. 5, 6, 8, 9, 10A.

Deputy Hutchison, the Sex Offender Registration Deputy, testified that homeless people are required to come into the office every Monday. 1RP 346, 417. They are to drop off their paperwork, which includes seven slots for indicating the "location that they slept and where they stayed for the previous week." 1RP 349.

Hutchison's first contact with Dalluge was in January 2017. 1RP 411. Dalluge had a fixed residence at the time. 1RP 351-52. Hutchison did not recall Dalluge being homeless prior to March 2017. 1RP 411-12.

As reflected in the to-convict instruction, the charging period for failing to register was March 29, 2017 through May 26, 2017. CP 61, 77. In a note dated March 29, 2017, Dalluge wrote to Hutchison that a domestic dispute arose and "we need to talk or stay in contact" if it was not resolved expediently. 1RP 352-53; Ex. 15. In response, Hutchison left a voice message on Dalluge's phone. 1RP 353.

Deputy Wester interacted with Dalluge at the sheriff's office on April 14. 1RP 307-08. Dalluge inquired about paperwork that was needed, as he did not have a residence or address of his own at the time. 1RP 308-09. Deputy Hutchison instructed Wester to give the homeless paperwork to Dalluge and have him fill it out. 1RP 309, 354. He told Wester the paperwork was due next Monday, and Dalluge should call him when he turned it in. 1RP 354. Wester got the transient form and went over it with Dalluge. 1RP 310. Dalluge appeared to understand. 1RP 310.

On April 17, Dalluge exchanged text messages with Hutchison. 1RP 354-58; Ex. 16. In one message, Dalluge gave a new address. 1RP 358. Hutchison told him he would stop by and have him sign a verification sheet. 1RP 358. Dalluge said he was not able to be there at the proposed time. 1RP 358. Hutchison attempted to arrange to meet Dalluge at the address, but nothing came of it. 1RP 358-59. Later that day, he drove to the address. 1RP 359. Dalluge was not there, and he was unable to verify that it was Dalluge's address. 1RP 360.

There were further contacts. On April 28, Dalluge left a voicemail for Hutchison. 1RP 377-78, 419-20. On May 4, Dalluge messaged Hutchison, saying he "should have everything sorted out soon." 1RP 360-61; Ex. 17. In a note date-stamped May 9, Dalluge asked Hutchison to contact his attorney regarding the sex offender registration. 1RP 361-62;

Ex. 18. In a note date-stamped May 23, Dalluge listed his previous residential address, writing "as I understand, I am fulfilling all necessaries. Please correct if I am incorrect." 1RP 362-63; Ex. 19. Following receipt of the May 23 note, Hutchison made no attempt to determine whether Dalluge had moved back home. 1RP 365. Hutchison never received a filled-out transient form from Dalluge. 1RP 373, 376.

2. Jury Instructions

The to-convict instruction provides:

> To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) Prior to March 29, 2017, the defendant was convicted of a felony sex offense, Rape in the Third Degree;
> (2) That due to that conviction, the defendant was required to register in the State of Washington as a sex offender between March 29, 2017 and May 26, 2017;
> (3) That during that time period, the defendant knowingly failed to comply with any of the following sex offender registration requirements:
>
> (a) the requirement that the defendant, who had a fixed residence but later lacked one, provide signed written notice to the sheriff of the county where the defendant last registered within three business days after ceasing to have a fixed residence;
>
> (b) the requirement that the defendant, lacking a fixed residence, report weekly on a day specified by the county sheriff's office and during normal business hours, in person, to the sheriff of the county where the defendant is registered;
>
> (c) the requirement that the defendant, lacking a fixed residence, comply with a request from the county

> sheriff for an accurate accounting of where the defendant stayed during the week.
>
> If you find from the evidence that elements (1) and (2), and any of the alternative elements 3(a), 3(b), or 3(c) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives 3(a), 3(b), or 3(c) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty. CP 77 (Instruction 12).

The defense submitted a written proposed jury instruction,[2] which reads as follows:

> If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (3)(a)(vii) or (viii) and (5) of this subsection. To prevail, the person must prove the defense by a preponderance of the evidence.
>
> Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably than not true. CP 60.

[2] The proposed affirmative defense instruction was filed and argued over on April 20, the same day that the court ruled standby counsel would take over as Dalluge's attorney. CP 59-60.

This affirmative defense instruction was discussed at the jury instruction conference. 1RP 448-55, 458-67. The prosecutor pointed out "it's an affirmative defense that you complied with all the requirements you were supposed to comply with" and "this doesn't give us any -- anything new in the jury instructions." 1RP 449. "If the offender followed all of the rules, it's an affirmative defense that they have followed all the rules." 1RP 454. "It seems a little odd, you know, to -- to make that as an affirmative defense instruction because I don't see anything different in here than what we're saying the law is." 1RP 454. The court said, "it's kind of just a reiteration of the fact that he either complied or didn't comply." 1RP 450-51. The court also commented "we're just telling them what the statute says." 1RP 454.

The attorneys noted the subsections referenced in the proposed instruction had been renumbered in the statute. 1RP 451-52. The attorneys agreed to set forth the relevant subsections at issue in the instruction, but the court proposed the relevant requirements be set forth without numbering them. 1RP 453-55. The attorneys and the court subsequently discussed the precise wording of the instruction in further depth. 1RP 457-67. Defense counsel persuaded the court to give the version of the instruction that was ultimately provided to the jury. 1RP 458-61, 463-67.

The affirmative defense instruction given to the jury provides:

> If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsection (6) of this section, which provides:
>
> (6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence. The notice shall include the information required by subsection (2)(a) of this section, except the photograph, fingerprints, and palmprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.
>
> Subsection (2)(a) provides:
>
> (2)(a) A person required to register under this section must provide the following information when registering: (i) Name and any aliases used; (ii) complete and accurate residential address or, if the person lacks a fixed residence, where he or she plans to stay; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) social security number; (viii) photograph; and (ix) fingerprints.
>
> (6)(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the

> week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.
>
> *To prevail, the person must prove the defense by a preponderance of the evidence.* Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not. CP 83 (Instruction 18).

3. Outcome

The jury found Dalluge guilty. CP 86. By special verdict, the jury found Dalluge, lacking a fixed residence, failed to comply with a request from the county sheriff for an accurate accounting of where he stayed during the week. CP 87. Also by special verdict, the jury unanimously answered "no" to whether Dalluge failed to comply with the weekly reporting requirement. CP 87. The jury could not unanimously agree on whether Dalluge failed to notify the sheriff within three business days after ceasing to have a fixed residence. CP 87.

4. Appeal

Dalluge advanced various arguments on appeal, including that counsel was ineffective in proposing an affirmative defense instruction that shifted the State's burden of proof onto Dalluge. The Court of Appeals rejected this argument and otherwise affirmed the conviction. Slip op. at 1, 4.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN REQUESTING AN AFFIRMATIVE DEFENSE INSTRUCTION THAT SHIFTED THE BURDEN OF PROOF FROM THE STATE, WHERE IT BELONGED, TO DALLUGE, WHERE IT DIDN'T.

Although the State had the burden of proving Dalluge's knowing failure to comply with registration requirements, his trial counsel argued for a jury instruction that required the defense to prove by a preponderance of the evidence that Dalluge complied with the requirements. Dalluge received ineffective assistance of counsel because the affirmative defense instruction shifted the burden of proof to Dalluge. Dalluge seeks review of this significant question of constitutional law under RAP 13.4(b)(3).

The accused is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Id. at 687. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 688.

The doctrine of invited error "generally forecloses review of an instructional error, but does not bar review of a claim of ineffective assistance of counsel based on such instruction." State v. Woods, 138 Wn.

App. 191, 197, 156 P.3d 309 (2007). Whether to seek an affirmative defense instruction is a strategic decision for the attorney to make. State v. Perez, 166 Wn. App. 55, 62, 269 P.3d 372 (2012). But "[n]ot 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.'" State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011) (quoting Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). No legitimate strategy justified the affirmative defense instruction in this case.

The State had the burden to prove Dalluge failed to comply with the registration requirements. The to-convict instruction required the State to prove that Dalluge knowingly failed to (1) provide written notice to the sheriff within three business days of lacking a fixed residence; (2) report to the sheriff on a weekly basis; or (3) comply with a request to provide an accurate accounting of where he stayed during the week. CP 74. The to-convict instruction tracks the statutory definition of the crime. RCW 9A.44.130(6)(a), (b).

The affirmative defense instruction, however, imposed the burden of proving compliance with these same requirements on Dalluge. CP 83.

That instruction stated it is an affirmative defense to the charge of failure to register that Dalluge provided written notice to the sheriff within three business days of lacking a fixed residence and that he subsequently complied with the requirements of subsection (6). The subsection (6) requirements include reporting to the sheriff on a weekly basis and compliance with a request to provide an accurate accounting of where he stayed during the week. Id. The jury was informed "[t]o prevail, the person must prove the defense by a preponderance of the evidence. Id.

Elements of the State's case were replicated in the affirmative defense instruction, where Dalluge was required to prove he complied with the requirements. The affirmative defense instruction created an inconsistency that misstated the law. It shifted the burden of proof onto the defendant. Counsel was ineffective in seeking to have the jury instructed in this manner.

State v. Carter, 127 Wn. App 713, 716-18, 112 P.3d 561 (2005) is instructive. The Carter court held defense counsel was ineffective for proposing an unwitting possession of a firearm instruction. Id. at 716-18. The defendant was charged with first degree unlawful possession of a firearm. Id. at 715. Knowing possession is an element of the offense. Id. at 717. Defense counsel proposed an affirmative defense instruction: "*The burden is on the defendant* to prove by a preponderance of the evidence

that the firearm was possessed unwittingly." Id. This instruction "erroneously placed the burden of proving unwitting possession on Robert Carter." Id. The Carter court reasoned that defense counsel performed deficiently because no reasonable attorney would have proposed an instruction erroneously shifting the burden of proof to the defense and no legitimate trial tactic could justify such performance. Id. at 717.

The same reasoning applies to Dalluge's case. In both cases, counsel advanced an affirmative defense instruction that required the defendant to prove something in order to avoid conviction. In both cases, the affirmative defense instruction impermissibly shifted the burden of proof onto the defendant by incorporating an element of the State's case into the defense. As in Carter, the jury here was instructed in a clearly inconsistent manner. On the one hand, it was told the State needed to prove Dalluge failed to adhere to one of three specific registration requirements. On the other hand, it was told it was a defense to the charge if Dalluge proved he complied with those same requirements. Requiring Dalluge to prove he complied with the registration requirements by a preponderance of the evidence improperly shifted the State's burden to prove Dalluge did not comply with the requirements.

In closing, defense counsel argued that Dalluge proved he "subsequently" complied with the requirements after providing notice to

the sheriff within three days of ceasing to have a fixed residence because the State did not additionally charge him for anything beyond May 26, the end of the charging period in this case. 1RP 531-33. He argued Dalluge proved the affirmative defense because "the State didn't charge him through today." 1RP 533. That is an objectively unreasonable argument. The supposed lack of a charge is not evidence of anything. Further, as pointed out by the prosecutor in rebuttal, defense counsel's argument was based on a fact not in evidence. 1RP 552. It would have been improper for the State to present evidence on an additional charge. 1RP 551-52.[3] Even based on defense counsel's interpretation of the affirmative defense, there was no evidence to support it. Defense counsel argued "there's no evidence he hasn't complied." 1RP 531. The affirmative defense, however, required Dalluge to prove that he did comply. It required Dalluge to prove he did not break the law, instead of requiring the State to prove that he did break the law.

The prosecutor correctly pointed out in closing argument that "if you look carefully at Instruction 18 where it says it's a defense to a crime, you'll see that what the affirmative defense is is that you actually did.

[3] In pre-trial proceedings, the prosecutor represented that there was another pending charge of failure to register against Dalluge that covered a time period subsequent to the charging period in the present case. 1RP 84-85; 2RP 100-01.

Okay. That's the defense. 'I registered. I satisfied the requirement.' . . . That's the affirmative defense." 1RP 503. "Instruction 18 is pretty much verbatim the language of the statute." 1RP 503. "The affirmative defense . . . is actually just the law. The affirmative defense, as I said, is a statement of the requirements, and the affirmative defense is 'I fulfilled them.'" 1RP 522. The affirmative defense instruction was a restatement of the registration requirements, with the gloss that Dalluge could escape conviction if he proved he complied with them. Defense counsel was deficient in pursuing an instruction that shifted the burden of proof.

Dalluge was prejudiced by counsel's deficient performance. Here, too, Carter is instructive. In Carter, the court rejected the State's argument that the defendant failed to demonstrate prejudice in light of other instructions that properly informed the jury of the State's burden. Carter, 127 Wn. App at 718. The flawed unwitting possession instruction created an inconsistency in the instructions as a whole and because "the inconsistency results from a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant." Id.

As in Carter, the jury in Dalluge's case was misled to believe Dalluge had the burden of proving he complied with the registration requirements. The inconsistent instruction involving this burden of proof

was a clear misstatement of the law. Dalluge is presumed to have been prejudiced.

The Court of Appeals, however, held there was no ineffective assistance of counsel, analyzing the issue as follows:

> The statutory affirmative defense at issue here is found in RCW 9A.44.130(6)(c). It provides a defense against failure to complete the appropriate reporting procedure upon becoming homeless if the defendant shows that he provided written notice of homelessness and then complied with the reporting procedure. RCW 9A.44.130(6). The jury did not convict on either of those bases. The special verdict found that Mr. Dalluge failed to provide an accurate weekly accounting of where he stayed. It was uncontested that he never provided the accounting. Since the verdict was based on uncontested facts not addressed by the affirmative defense, the instruction could not have prejudiced Mr. Dalluge. Slip op. at 4.

The Court of Appeals misinterpreted the affirmative defense statute and, by extension, the affirmative defense instruction based on that statute.

The affirmative defense provision, RCW 9A.44.130(6)(c), provides:

> If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vi) or (vii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

The Court of Appeals interpreted the affirmative defense provision, and the instruction based on that provision, to require Dalluge to show "that he provided written notice of homelessness and then complied with the reporting procedure," not that he "failed to provide an accurate weekly accounting of where he stayed." Slip op. at 4. Based on this faulty premise, the Court reasoned Dalluge was not prejudiced because the jury found Dalluge guilty only of failing to provide an accurate accounting, which was "not addressed by the affirmative defense." Slip op. at 4.

The statutory provision, though, requires the defendant to prove not only compliance with the written notice requirement, but also that he or she "complied with the requirements of subsections (4)(a)(vi) or (vii) **and (6)** of this section." RCW 9A.44.130(6)(c) (emphasis added). Subsection (6) of the statute requires, among other things, that "The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request." RCW 9A.44.130(6)(b).

The affirmative defense instruction tracked the language of the statute in this respect, requiring Dalluge to prove, among other things, that he "complied with the requirements of subsection (6) of this section, which provides . . . (6)(b) . . . The person must keep an accurate

accounting of where he or she stays during the week and provide it to the county sheriff upon request." CP 83 (Instruction 18).

It is untrue, then, that the affirmative defense did not address the accounting requirement upon which the jury convicted. The affirmative defense required Dalluge to prove he provided an accurate accounting to the sheriff, which is an element of the State's case. See CP 77 (to-convict instruction).

In its decision, this Court of Appeals also stated "[i]t was uncontested that he never provided the accounting" and "the verdict was based on uncontested facts[.]" Slip op. at 4. There was evidence, though, by which a rational juror could find the State failed to prove the accounting element of its case.

Dalluge exchanged text messages with Deputy Hutchison on April 17, 2017. 1RP 354-58; Ex. 16. This was within the charging period set forth in the to-convict instruction. CP 74. In one message, Dalluge gave a new address. 1RP 358; Ex.16. Hutchison responded by telling Dalluge that he would stop by and have him sign a verification sheet. 1RP 358. Hutchison attempted to arrange to meet Dalluge at the address, but nothing came of it. 1RP 358-59. Later that day, Hutchinson drove to the address. 1RP 359. Dalluge was not there, and Hutchinson was unable to "verify" that it was Dalluge's address. 1RP 360.

This is evidence that Dalluge provided an accounting of where he was staying. The statute does not require verification of the address. RCW 9A.44.130(6)(b). Being unable to confirm the accuracy of the address does not mean the State proved the accounting was inaccurate. And nothing in the statute requires the accounting be in writing on a form provided by the sheriff's office. RCW 9A.44.130(6)(b). Alternatively, this is evidence that he was under no obligation to provide an accounting because that requirement applies to the homeless, whereas Dalluge provided a residential address where he was staying. At the very least, it is a debatable question whether Dalluge provided an accurate accounting based on this communication with the deputy or whether he even needed to because he reported staying at a residential address. In resolving the question, the jury may have looked to the affirmative defense instruction as a guide that Dalluge had the burden of proof to clear up the matter.

Where counsel deficiently obtains an affirmative defense instruction that shifts the burden of proof on an element of the State's case, the misstatement of the law "is presumed to have misled the jury in a manner prejudicial to the defendant." Carter, 127 Wn. App at 718. The State has not overcome the presumption of prejudice here.

F. CONCLUSION

For the reasons stated, Dalluge requests that this Court grant review.

DATED this 29th day of April 2020.

Respectfully submitted,

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APPENDIX A

FILED
FEBRUARY 25, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. AMEL WILLIAM DALLUGE, Appellant.	)	No. 36015-6-III UNPUBLISHED OPINION

KORSMO, J. — Amel Dalluge appeals his conviction for failing to register as a sex offender, raising claims of ineffective assistance of counsel, violation of his right to be present at trial, and challenges to certain legal financial obligations (LFOs) imposed at sentencing. We affirm the conviction and strike the LFOs.

FACTS

Appellant registered as a sex offender in Grant County from 2014 until he became homeless in March 2017. He informed the sheriff's office of the change in circumstances and eventually visited the sheriff's office in mid-April to learn how to register as a transient. However, he never completed the appropriate transient registration forms. Instead, he submitted a variety of incomplete paperwork. He was charged with one count of failure to register.

Appellant decided to represent himself at trial and standby counsel was appointed. On the final day of trial, Mr. Dalluge informed the court he felt unwell and would not appear for trial. Medical professionals examined him in jail and found no health problems. The court sent standby counsel to determine how appellant wished to proceed. Mr. Dalluge requested that standby counsel take over representation. He did not wish for a continuance or to observe the remainder of the trial.

The court instructed on a statutory affirmative defense.[1] The jury was instructed on three alternative means of committing the crime: (1) failure to provide signed written notice after changing address, (2) failure to report weekly, and (3) failure to provide accurate accounting of where he stayed each week. By special verdict, the jury found that Mr. Dalluge had failed to provide an accurate accounting.

The court imposed a standard range term of 45 days in jail and one year of community custody. Mr. Dalluge timely appealed to this court. A panel considered his case without hearing argument.

ANALYSIS

Ineffective Assistance of Counsel

Appellant initially argues that he received ineffective assistance of counsel because his standby attorney allegedly proposed an affirmative defense instruction that

[1] Mr. Dalluge contends that standby counsel proposed the instruction, but our record does not indicate whether the instruction originated with counsel or with Mr. Dalluge.

shifted the burden of proof to the defense. We need not decide whether counsel erred because Mr. Dalluge cannot establish prejudice.

We consider this issue in accordance with well settled law. Counsel's failure to live up to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Review is highly deferential and we engage in the presumption that counsel was competent; moreover, counsel's strategic or tactical choices are not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-pronged test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. When a claim can be resolved on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). A defense attorney may render ineffective assistance by proposing a detrimental jury instruction. *State v. Woods*, 138 Wn. App. 191, 197-198, 156 P.3d 309 (2007). However, the decision to seek an affirmative

defense is often heavily dependent on individual case strategy. *State v. Michael*, 160 Wn. App. 522, 527-528, 247 P.3d 842 (2011).

The statutory affirmative defense at issue here is found in RCW 9A.44.130(6)(c). It provides a defense against failure to complete the appropriate reporting procedure upon becoming homeless if the defendant shows that he provided written notice of homelessness and then complied with the reporting procedure. RCW 9A.44.130(6). The jury did not convict on either of those bases. The special verdict found that Mr. Dalluge failed to provide an accurate weekly accounting of where he stayed. It was uncontested that he never provided the accounting. Since the verdict was based on uncontested facts not addressed by the affirmative defense, the instruction could not have prejudiced Mr. Dalluge.

Since there was no prejudice, Mr. Dalluge cannot establish that he was denied effective assistance of counsel.

Right to Presence

Appellant next argues that his right to be present at trial was violated because the court failed to determine if his absence was voluntary. The record indicates that the absence was voluntary and his claim is waived.

A defendant has a right to appear at his trial. CONST. art. I, § 2. A defendant may waive this right and the trial court's decision to proceed with the trial in the defendant's absence is reviewed for abuse of discretion. *State v. Thurlby*, 184 Wn.2d 618, 624-625,

359 P.3d 793 (2015). When a defendant fails to appear for trial, the trial court must ascertain whether the defendant's absence is voluntary. *State v. Thompson*, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994). Our courts traditionally perform a three step analysis that includes:

> (1) sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) a preliminary finding of voluntariness (when justified), and (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

Id. The court must consider all reasonable presumptions the defendant did not voluntarily waive his rights. *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). While useful for confirming voluntariness when a defendant inexplicably fails to appear, this framework is not essential if the defendant informs the court he wishes to absent himself. *State v. Davis*, 6 Wn. App. 2d 43, 55, 429 P.3d 534 (2018). The third analytical prong is primarily meant to ensure the defendant an opportunity to explain the absence to the court. *Thurlby*, 184 Wn.2d at 629.

In this case, appellant had an opportunity to explain his absence to the court. The court requested multiple medical evaluations to ensure there was no malady preventing appellant's appearance. Options to seek a continuance or view the trial were also presented. However, appellant informed his attorney that he wanted the trial to proceed without him and refused the alternatives. The trial court considered all options and followed appellant's clear, unambiguous, and informed request. Therefore, we conclude

that appellant voluntarily waived his right to appear and the trial court did not abuse its discretion proceeding with the trial.

Legal Financial Obligations

Appellant challenges certain LFOs imposed by the trial court: the criminal filing fee, community supervision costs, DNA collection fee, and interest on all obligations. Washington's law changed following appellant's sentencing and now prohibits courts from imposing most fees on indigent defendants. The DNA collection fee may not be imposed if a defendant's DNA previously was collected. The State concedes the error. We reverse the challenged LFOs and direct the trial court to strike them.

Statement of Additional Grounds

Appellant raises a number of issues in his statement of additional grounds, all of which lack merit. He first contends he was improperly charged with three alternatives to convict for one count. However, it is well established the State may charge a defendant under alternative theories so long as it leads to a single conviction. *State v. Wright*, 165 Wn.2d 783, 801-802, 203 P.3d 1027 (2009).

Additionally, Mr. Dalluge claims the evidence was insufficient because the statute uses permissive language, the State extended his registration requirements, the laws have changed to make the remedy inappropriate, and this case should be handled by juvenile court. These arguments are inadequate.

A statement of additional grounds must adequately inform this court of the issue the appellant wishes to raise and also may only address errors identifiable in the appellate record. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). New evidence not considered at trial is properly brought through a personal restraint petition. *Id.* This court will not review solely conclusory statements that do not direct us to appropriate issues. *State v. Phillips*, 6 Wn. App. 2d 651, 677, 431 P.3d 1056 (2018). Appellant's claims constitute conclusory statements that are too vague for this court to properly evaluate alleged error or determine where on the record the alleged errors occurred. We are not inclined to guess the issues we are requested to address.

The conviction is affirmed and the case remanded to strike the noted LFOs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Pennell, J.

APPENDIX B

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. AMEL WILLIAM DALLUGE, Appellant.	)	No. 36015-6-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 25, 2020 is hereby denied.

PANEL: Korsmo, Lawrence-Berrey, Pennell

FOR THE COURT:

REBECCA PENNELL
Chief Judge

NIELSEN KOCH P.L.L.C.

April 29, 2020 - 12:04 PM

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