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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

QUALAGINE APERO HUDSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 12-1-00220-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it found the defendant had breached the plea agreement, when the uncontroverted, un-objected to evidence established that the defendant committed and was subsequently convicted of a felony offense while on pre-sentencing release in violation of the plea agreement?
2. Did the defendant's trial attorney provide ineffective assistance of counsel when he carried out and facilitated the defendant's preferred strategy offering mitigation at sentencing?

B. STATEMENT OF THE CASE.

On January 17, 2012, Appellant Qualagine Apero Hudson (the "defendant") was charged with two felony stolen vehicle offenses. CP 1-2. Several weeks later the charges were amended to include a total of eleven counts, the most serious of which was Count X, Leading Organized Crime, a level ten offense which carried a standard sentencing range of 149 – 198 months in prison. CP 7-18, 43-59.

On July 12, 2012, the defendant elected to plead guilty and enter into a plea agreement to serve as a confidential informant. CP 26-39, 40-52, 83-88, 147-48. He was released on his own recognizance with a directive not to commit any criminal offenses, a directive that was mirrored in the plea agreement. *Id.* On October 6, 2012, the state brought a motion for a bench warrant because the defendant had been charged with

a felony motor vehicle theft offense in King County after he had been released pursuant to the plea agreement and the personal recognizance order. CP 149-50. The defendant was arrested on the warrant on November 20, 2012, and at his first appearance was ordered held without bail.

On June 6, 2014, the defendant appeared for sentencing.

06/06/2014 RP 5. After a brief colloquy the trial court proceeded to sentencing and imposed a low end sentence of 149 months in prison on the organized crime charge with all of the lesser counts running concurrent. CP 43-59. The defendant filed an appeal which was heard and decided by Division One of this Court under case number 73938-7. CP 102-112.

Division One's unpublished opinion was filed on December 28, 2015. *Id.* The opinion resolved three issues. First the court held that the defendant was not entitled to withdraw his plea based on the plea agreement not having been filed with the court. *Id.*, p.5. The court noted that, "Given the sensitivity of this agreement, we expect that the State had good reason to withhold the agreement from the record at the time Hudson's guilty plea was entered. Moreover, the parties have now made the agreement part of the record [*See* CP 83-88.] on appellate review. Hudson does not contend that the agreement before us is different than the one he made." CP 102-112, p. 5.

The second and third issues were (1) whether the defendant was entitled to an evidentiary hearing [CP 102-112, p. 5.], and (2) whether the attorney that had represented him was ineffective [CP 102-112, p.8.]. As to those issues, the defendant was granted relief as to the evidentiary hearing and his case was remanded for “resentencing consistent with this opinion.” *Id.*, p.10.

On July 22, 2016, the defendant appeared for re-sentencing after remand. 07/22/2016 RP 1. Two exhibits were marked for identification and subsequently admitted. Exhibits 1 and 2. Exhibit 1 is an affidavit from a King County defense paralegal to which was attached a copy of a King County docket and judgment. Exhibit 1. Both of the attachments were “downloaded from the King County Superior Court Clerk’s Electronic Court Records” and sworn to be “true and correct copies of the Docket and the Judgment and Sentence”. *Id.* The attachments were from the defendant’s King County conviction of the crime “Taking a Motor Vehicle Without Permission in the Second Degree”. *Id.*

Exhibit 2 was marked for identification at the request of the defendant. 07/22/2016 RP 5. It is a police report which documented the arrest of the defendant by his law enforcement handler on the King County vehicle theft charge. Exhibit 2, p. 3 of 4. The exhibit included the

defendant's custodial interview in which he explained the circumstances of his involvement in the theft of the vehicle. *Id.*

Both of the exhibits were admitted into evidence without objection. 07/22/2016 RP 8. Thereupon the defendant was sworn in and gave testimony in support of a request to either withdraw his guilty plea and/or for a mitigated sentence. 07/22/2016 RP 8-12. The trial court denied the defendant's request to withdraw his guilty plea and subsequently entered a new judgment in which he was sentenced to the same low end sentence that he had received in 2014. CP 118-31. 12/16/2016 RP 1-4. The judgment was entered with the parties' agreement and without objection. *Id.* The trial court subsequently entered findings of fact and conclusions of law related to the evidentiary hearing. CP 132-136.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT THE DEFENDANT HAD BREACHED THE PLEA AGREEMENT WHERE THE UNCONTROVERTED, UN-OBJECTED TO EVIDENCE ESTABLISHED THAT THE DEFENDANT COMMITTED AND WAS CONVICTED OF A FELONY OFFENSE WHILE ON PRE-SENTENCING RELEASE IN VIOLATION OF THE PLEA AGREEMENT.

A plea agreement is a contract between the state and the defendant.

State v. Sledge, 133 Wn.2d 828, 838–39, 947 P.2d 1199 (1997), *In re Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004), *State v. Malone*, 138 Wn.

App. 587, 592, 157 P.3d 909 (2007). When a defendant breaches a plea agreement, due process requires that a hearing be held and that the trial court determine whether a breach occurred. *Matter of James*, 96 Wn.2d 847, 850, 640 P.2d 18, 20 (1982). It has been said of such a hearing, “that the issue of noncompliance is a question of fact to be determined by the court, and that to permit the State to unilaterally nullify an agreement would constitute ‘manifest impropriety,’ . . . and an abdication of the Court's duty to ensure ‘fairness and candor.’ ” *Id.* (citation omitted), quoting *United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir. 1976) and *State v. Tourtellotte*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977).

At the evidentiary hearing the defendant is entitled to several important rights. These include “an opportunity to call witnesses”, and a requirement that the state “prove, by a preponderance of the evidence, that the defendant has failed to perform his or her part of the agreement.”

Matter of James, 96 Wn.2d at 850, citing *United States v. Simmons*, 537 F.2d 1260 (4th Cir. 1976), *Gamble v. State*, 95 Nev. 904, 604 P.2d 335 (1979), *State v. Warren*, 124 Ariz. 396, 604 P.2d 660 (Ct.App.1979) and *State v. Curry*, 49 Ohio App.2d 180, 359 N.E.2d 1379 (1976). The state may not unilaterally refuse to abide by the terms of a plea bargain but even so:

The state is not bound by a plea bargaining agreement when the defendant commits another offense between the time of the agreement and the sentencing. Moreover, a defendant who hides his past criminal record by giving a false name at the time of entering into a plea bargain commits fraud, and the judgment resulting from the plea bargain is subject to vacation. A prosecutor who seeks vacation of the judgment under such circumstances does not breach the state's obligation under the bargain.
(footnotes omitted)

Ferguson, *Criminal Practice & Procedure* §3418 (3rd Ed., Nov. 2017 Update). *See also State v. Morley*, 35 Wn. App. 45, 47–48, 665 P.2d 419 (1983), *State v. Roberson*, 118 Wn. App. 151, 158-59, 74 P.3d 1208 (2003).

The standard of review for a trial court's finding of breach by the defendant is abuse of discretion. *State v. Malone*, 138 Wn. App. 587, 592–93, 157 P.3d 909 (2007). “An abuse of discretion occurs when the trial court's decision is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. Cross*, 156 Wn. App. 568, 580, 234 P.3d 288 (2010), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To apply this standard the court must determine that, “first, the court has acted on untenable grounds if its factual findings are unsupported by the record; second, the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; third, the court has

acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.” *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290, 1296 (2014).

The trial court’s finding that the defendant breached his plea agreement was not an abuse of discretion. The pertinent findings appear on page two, where the court found that:

The defendant pled guilty to all eleven counts on July 12, 2012.

Before pleading, the court reviewed the plea agreement and questioned the defendant to ensure his plea was knowing, voluntary and willful.

The defendant was released from custody after the plea so he could perform his requirements under the plea agreement.

After the defendant’s release, he was charged in King County with the theft of a vintage automobile.

A bench warrant issued for the defendant’s arrest on November 6, 2012.

The defendant was later arrested and convicted on the King County theft of the vintage automobile case under King County Cause No. 15-1-06276-6.

CP 132-136, p. 2.

These findings should be considered verities. Although the defendant challenged other findings he did not challenge these. Brief of Appellant, p. 2. Nor could he. There was uncontroverted, and therefore

substantial evidence in the record that supports these findings. The plea agreement explicitly required that “(4) The defendant must not violate any municipal, county, state or federal law. . . .” CP 155-56. Thus it follows that the defendant breached the plea agreement when he committed and was subsequently convicted of the felony crime of second degree taking a motor vehicle between September 22 and October 31, 2012. Evidentiary Hearing, Exhibit 1.

A trial court’s findings of fact are verities on appeal if error is not assigned to them or if they are supported by substantial evidence. *State v. E.J.J.*, 183 Wn.2d 497, 515, 354 P.3d 815, 824 (2015) (“Where challenged findings are supported by substantial evidence, those findings also are binding on appeal.”), *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363, 371 (1997) (Findings of fact “will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.”). “Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation.” *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

In light of the trial court’s findings of fact, it does not take sophisticated analysis to conclude that the defendant breached paragraph 4 of the plea agreement. If the defendant had committed an infraction or a

misdemeanor, this argument might be about materiality. That argument has not been made for the very good reason that the defendant committed a felony punishable by up to five years in prison and with a standard range (in light of the defendant's extraordinary criminal history) of 22 to 29 months in prison for a level one offense. Evidentiary Hearing, Exhibit 1, p.2. The defendant committed the offense three months after entering into the plea agreement and while on personal recognizance release. CP 147-54. That is after promising in the agreement and having been ordered by the court at the hearing that he must refrain from committing new criminal offenses, the defendant committed a new criminal offense. Even if the defendant had attempted to perform the other requirements that he agreed to in order to serve as a confidential informant, his performance would have been worthless. Any case that he may have assisted the police with would have surely been compromised by his violation of the express terms of the plea agreement, not to mention having committed an offense that would be considered impeachment under ER 609.

The defendant's argument on appeal is different than the position he took before the trial court. In the trial court the defendant did not contest that he had breached. 07/22/2016 RP 9-10. In the defendant's testimony after the court swore him in, the defendant stated, "I never really got to tell my side of the story. . . And then afterwards then they

filed the charges so it was kind of like the wheels are already in motion with the appeal so I just told Mr. Ryan here I want to skip the hearing and possibly go straight to sentencing you know, just explain my side of the story” *Id.*

The defendant’s reliance on mitigation was not irrational. The defendant was before the court having been previously convicted of 22 felony offenses in addition to the 10 that he was being sentenced for. In support of his mitigation plea, he told the court, “There was also some work after I was arrested, you know. I still met with these guys a few times. There was some, like Mr. Greer said, there was some talk about testifying in a murder, and put together a counteroffer because I thought that was going to be last minute. I don’t know if the defendant pled guilty. I wasn’t needed or, like I said, they felt I wasn’t credible but, you know, I mean, I made good-faith efforts.” 07/22/2016 RP 10. If the defendant had falsely claimed that he had not been convicted in King County of the stolen vehicle offense his prospects at sentencing surely would have been much worse. As it is, despite the defendant’s criminal record, he was successful in persuading the trial court to grant him a lenient, low end sentence. The defendant and his trial counsel thus made a wise choice in how to proceed in light of the defendant’s unique circumstances.

Whatever speculation one might indulge in as to how the defendant might have challenged the validity of the King County conviction, there is no evidence in the record of what that challenge might be. There is no evidence of any impropriety in the judgment of the King County court as to the defendant's guilt. From the perspective of the Pierce County trial judge, since there was no legitimate issue as to breach, the only question was where in the standard range the defendant would be sentenced. It follows that since the defendant received a low end sentence, he reaped a nearly 50 month benefit by not falsely challenging the factual basis of the breach and instead proceeding directly to sentencing where his mitigation actually mattered.

The defendant also argues admissibility of evidence. In the trial court the defendant did not object to the admission of either of the two exhibits. 07/22/2017 RP 8. Thus under RAP 2.5(a) he failed to preserve any objection that he may have had. This court should exercise its discretion and not consider the defendant's claims against admissibility. *See State v. Blazina*, 182 Wn.2d 827, 832–33, 344 P.3d 680, 682 (2015). “It is well settled that an ‘appellate court may refuse to review any claim of error which was not raised in the trial court.’ . . . This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond.” *Id.* (citation omitted), citing *State v.*

Davis, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *cert. denied*, 134 U.S. 62, 134 S. Ct. 62, 187 L. Ed. 2d 51 (2013).

In the event this Court elects to consider the admissibility argument, the trial court's decision should nevertheless be affirmed. The fact proved by the two admitted exhibits was that the defendant was convicted in King County of a particular crime committed during a particular time period after the plea agreement was entered into. This is no different than what must be proved in order for a trial court to calculate an offender score at sentencing. Trial courts rely on the type of evidence relied upon here in sentencing proceedings day in day out, and such reliance is explicitly provided for by the evidence rules. ER 1101(c) ("The rules . . . need not be applied in the following situations: . . . preliminary determinations in criminal cases; sentencing or granting or revoking probation. . ."). Moreover, it has been said that the best evidence of a defendant's conviction of a crime is documentary, namely "a certified copy of a judgment and sentence". *State v. Rivers*, 130 Wn. App. 689, 701, 128 P.3d 608, 614 (2005).

The existence of a prior conviction is a question of fact. *In re Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540, 545 (2010). " 'The best evidence of a prior conviction is a certified copy of the judgment.' . . . 'However, the State may introduce other comparable documents of record

or transcripts of prior proceedings to establish criminal history.’ ” *Id.* (citation omitted), quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). In terms of admissibility, the authenticity of a document offered into evidence is a preliminary question to which the rules of evidence do not apply. *See* ER 901(a), (b)(1). “The judge, not the jury, decides whether the proponent has made a prima facie showing of authenticity. This is a preliminary determination, governed by the usual rules governing other preliminary determinations. Thus, in deciding the issue of authenticity, the court may consider evidence that might otherwise be objectionable under other rules.” Teglund, 5C Wash. Prac., Evidence Law and Practice § 901.4 (6th ed. 2017).

The defendant relies upon the *Dahl* case as standing for the proposition that documentary evidence is not admissible in a hearing such as this. *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999). The evidence at issue in *Dahl* was an incident of indecent exposure, not admissibility of a judgment of a court of record. *Id.* at 687. The Supreme Court described the evidence as follows: “The only information the court had about the event was fourth hand: two girls reported an indecent exposure to a police officer, who informed [the defendant’s] CCO, who told O’Connell, who included the incident in a treatment report. This treatment report was then relied upon by the judge at the revocation

proceeding.” While the court found a due process violation, it also distinguished testimonial evidence about an incident from documentary evidence commonly admitted in such proceedings: “The minimal due process right to confront and cross-examine witnesses is not absolute. Courts have limited the right to confrontation afforded during revocation proceedings by admitting substitutes for live testimony, such as reports, affidavits and documentary evidence.” *Id.* at 686. Thus **Dahl** does not stand for the proposition that a fact such as a conviction for a crime may not be proved by documentary evidence.

It would be surprising if **Dahl** had gone as far as the defendant argues that it did. The declarant in a judgment is a superior court judge. Thus if a judgment is hearsay and for that reason not admissible, judges would be required to appear as witnesses in order to establish criminal history. This is an absurd notion. There is no hint in **Dahl** or any other case that it is necessary to call the judge who entered a judgment to the stand in a revocation hearing in order to avoid a hearsay objection.

In this case the state elected to submit not just the defendant’s King County judgment but also the computer listing of clerk’s papers from the King County proceedings. Evidentiary Hearing, Exhibit 1, p.2. It thus admitted much more than just the usual certified copy of a judgement. The documents were authenticated by an affidavit sworn under oath by a

paralegal working for a King County public defense agency. No question was raised in the trial court about authenticity or of the fact of the defendant's conviction. The evidence was therefore properly admitted and properly considered on the question of breach or not.

It should be noted that the addition of the clerk's record in the exhibit furnished the trial court with considerable additional evidence about the King County conviction. That evidence dispels another argument from the defense, namely that the King County conviction was obtained as a pretext for establishing a violation in this case. The clerk's record showed the date the defendant was charged, the entry of a transport order on the same date, the defendant's first appearance at arraignment on November 5, 2015, and the defendant's guilty plea on November 19, 2015. At that time the defendant was already serving his sentence from this case after having been originally sentenced on June 6, 2014. CP 43-59. What's more, at that time neither the Division One unpublished opinion, which was filed on December 28, 2015, nor had the mandate been issued. CP 102-112. Thus at the time the defendant was charged in King County, there is no evidence that the King County prosecutor might have had an ulterior motive for filing the stolen motor vehicle charge. In fact the King County prosecutor listed this case as criminal history in the

defendant's disposition in King County. Evidentiary Hearing, Exhibit 1, Appendix B.

The defendant also argues that he suffered prejudice as a result of pre-accusatorial delay. Pre-accusatorial delay can under certain circumstances constitute a due process violation. One example is where unwarranted delay leads to loss of juvenile court jurisdiction. *State v. Salavea*, 151 Wn.2d 133, 138, 86 P.3d 125, 127 (2004) (“Absent intentional or negligent prosecutorial delay, where a defendant commits a crime before he is 18 but is not charged until after he is 18, there is not a violation of due process.”), citing *State v. Dixon*, 114 Wn.2d 857, 858–59, 792 P.2d 137 (1990) and *State v. Calderon*, 102 Wn.2d 348, 349, 684 P.2d 1293 (1984). Other circumstances include loss of evidence. *State v. Oppelt*, 172 Wn.2d 285, 257 P.3d 653 (2011). In such cases, the “test, simply stated, is that (1) the defendant must show actual prejudice from the delay; (2) if the defendant shows prejudice, the court must determine the reasons for the delay; (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution.” *Id.* at 295

The defendant has not and cannot show prejudice from pre-accusatorial delay. In the first place he would need to show that he suffered prejudice in the King County case rather than in a collateral case

such as this one. There is no basis for the suggestion that delay in one case can cause a due process violation in a wholly separate case. Furthermore, the chronology does not support the defendant's implicit accusation of collusion between the King and Pierce County prosecutors. Far from filing a charge belatedly to bolster enforcement of the plea agreement, the record shows that the defendant was prosecuted in King County well after the defendant had already been sentenced in this case. There is no evidence in the record that the King County prosecutors were even aware of the Pierce County plea agreement. The only indication that they were even aware of the case was that it was counted as criminal history in the calculation of the defendant's offender score. The record thus dispels any notion that there was collusion between the two prosecuting authorities in order to secure a conviction that would lead to the defendant violating his plea agreement.

In this case the record is silent as to why the King County auto theft charge was filed in 2015. However, since there is no evidence of improper or unlawful conduct by the prosecution in King County, the King County conviction is just what it appears to be, namely a relevant conviction which established that the defendant violated his plea agreement. Thus, there was uncontroverted and therefore substantial evidence supporting the trial court's finding to that effect and therefore no

due process violation when the trial court concluded that the defendant had breached his plea agreement. As to the breach issue, the defendant's conviction and sentence should be affirmed.

2. THE DEFENDANT'S TRIAL ATTORNEY DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE CARRIED OUT AND FACILITATED THE DEFENDANT'S STRATEGY OF OFFERING MITIGATION IN SUPPORT OF A LOW-END SENTENCE.

The defendant relies on the same evidence and arguments for his ineffective assistance claim as for his due process claim. The foregoing discussion of the sufficiency of the evidence of the defendant's breach of his plea agreement applies equally in response to the ineffective assistance claim. In short, the defendant could in theory have challenged the fact of his conviction in King County. But had he done so, he would have undermined his effort to mitigate the seriousness of his breach and could well have been exposed to a much higher sentence.

To prevail on an ineffective assistance of counsel claim a defendant must prove that his trial counsel's performance was deficient and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A trial attorney's counsel can be said to be deficient when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. *State v. McFarland*, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995).

“Strickland begins with a strong presumption . . . counsel’s performance was reasonable.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel’s performance.” *Id.* at 42, citing *State v. Richenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

The reasons for appellate deference to trial counsel are rooted in the Sixth Amendment itself. It has been recognized that if mandatory rules for the conduct of criminal trials were to be established, the independent judgment relied upon by defense counsel would necessarily be eroded:

[T]he Strickland standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve. . . . Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to ‘second-guess counsel’s assistance after conviction or adverse sentence.’ ”

Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citation omitted), quoting *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Washington Supreme Court has stressed the same reasons for deference to trial counsel’s judgment: “The Court did not set out detailed rules

for reasonable conduct because ‘[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions’. Courts must be highly deferential. . . .” *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1, 18 (2001), quoting *Strickland v. Washington*, 466 U.S. at 689. When evaluating an ineffective assistance argument, the utmost deference must be given to counsel’s tactical and strategic decisions. *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007), citing *Strickland v. Washington*, 466 U.S. at 689. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A fair assessment of trial attorney performance requires “every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 690. The defendant bears the burden of establishing the absence of any “conceivable” legitimate strategy or tactic explaining counsel’s performance to rebut the strong presumption that counsel’s performance was effective. *State v. Grier*, 171 Wn.2d at 42.

Including both his current and other current offenses, the defendant was appearing before the trial court with a criminal history of thirty felony convictions. Any judge confronting a defendant with such an extensive criminal record who had committed yet another a crime while on pre-sentencing release,

might well have opted for the high end of the range. The defendant had only one realistic hope of avoiding a high end sentence, namely persuading the court that his mitigation evidence made him worthy of leniency. Few trial defense attorneys would instead opt to challenge a fact as easily proven as a prior conviction. Thus it cannot be said that the defendant's trial counsel's strategic decision (which paid off) constitutes deficient performance. Trial defense counsel did not commit ineffective assistance by facilitating the defendant's ability to make the most of his mitigation argument. The conviction and sentence should be affirmed.

D. CONCLUSION.

For the foregoing reasons, the defendant's conviction and sentence should be affirmed.

DATED: Monday, December 18, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney



JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:

The undersigned certifies that on this day she delivered by e-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.

12/18/17
Date

Theresa Kar
Signature

PIERCE COUNTY PROSECUTING ATTORNEY

December 19, 2017 - 9:38 AM

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